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MOTION TO DISMISS

Reply Brief of Defendants
in Error

IN THE

SUPREME COURT

OF THE

UNITED STATES

No. 371.

OCTOBER TERM, 1924.

NORTHERN PACIFIC RAILWAY CO., et al.,
Plaintiffs in Error,
v.
THE DEPARTMENT OF PUBLIC WORKS OF WASHINGTON, et al.,
Defendants in Error.

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Reply Brief of Defendants in Error

JOHN H. DUNBAR,
Attorney General of the State of Washington,

RAYMOND W. CLIFFORD,
STEPHEN V. CAREY,
Attorneys for Defendants in Error.

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The first ground for dismissal urged by defendants in error is that the judgment attacked herein, if reviewable at all in this court, can under Section 237 of the Judicial Code as amended, be reviewed only by certiorari and not by writ of error. Plaintiffs in error argue this question has been decided adversely

to our contention and cite two cases as having settled the question. An examination of these two cases, and citations therein, discloses the following.

In *State ex rel. Southwestern Bell Telephone Co. v. Public Service Commission,* 262 U. S. 276, the point was not raised or discussed. The opinion in the case of *Bluefield Water Works and Improvement Co. v. Public Service Commission,* 262 U. S. 679, cites two cases in support of what is there said concerning the scope of writ of error. The first of these cases, *Oklahoma Natural Gas Co. v. Russell,* 261 U. S. 290, was not brought to this court on writ of error, but was an appeal from a Federal district court. The contention there made and determined by the court was the application of Section 266 Judicial Code. In the second case, *Ohio Valley Water Co. v. Ben Avon Borough,* 253 U. S. 287, no motion to dismiss upon any ground was interposed, and the point raised by our motion was not presented or discussed. The case went off upon a determination that no appeal sufficient to satisfy the requirement of due process of law was provided by the Public Service Commission Law of Pennsylvania.

The *Bluefield* case, *supra,* which alone of the cases mentioned contains any discussion of the propriety of writ of error, and which is said in the brief of plaintiffs in error to be exactly like the instant case, is clearly distinguishable. The determining consideration in that case was the holding that, where

the plea of confiscation is raised, due process requires a judicial re-examination under state law of both law and fact, a procedure not provided under the law of West Virginia as construed by the courts of that state. In the opinion in the *Bluefield* case, this court states the situation as follows (p. 688):

"The State Supreme Court of Appeals holds that the valuing of the property of a public utility corporation and prescribing rates are purely legislative acts not subject to judicial review except in so far as may be necessary to determine whether such rates are void on constitutional or other grounds; and that findings of fact by the commission based on evidence to support them will not be reviewed by the court. *Bluefield v. Water Works Co.*, 81 W. Va. 201, 204; *Coal and Coke Co. v. Public Service Commission*, 84 W. Va. 662, 678; *Charleston v. Public Service Commission*, 86 W. Va. 536."

The law of West Virginia therefore denied due process, and there was drawn in question the validity of a statute of a State on the ground of repugnancy to the Federal Constitution. Writ of error was accordingly the appropriate means of review under Section 237. The facts are entirely otherwise in the case at bar. It has never been contended in this case, nor could it be, that the law of Washington as construed by the courts of the State does not provide complete and adequate due process. The plan of regulation prescribed by the Washington statute, namely a full hearing before the administrative body on complaint and after notice, with a judicial review of both law and fact in the Superior Court and on ap-

peal in the Supreme Court on the record made before the administrative body, was expressly approved by the Supreme Court of the United States in *State ex. rel. O. R. & N. Co. v. Fairchild et al.*, 224 U. S. 510, as pointed out in our opening brief.

If the plaintiffs in error can bring the case at bar, from a State the law and courts of which have accorded due process in all respects, before the Supreme Court of the United States by means of writ of error, it is difficult to conceive an order of a state administrative body or officer which would not be so reviewable if a plaintiff in error choose to allege in form a violation of the Fourteenth Amendment. The motion to dismiss should be granted.

Respectfully submitted,

JOHN H. DUNBAR,
Attorney General of the State of Washington,

RAYMOND W. CLIFFORD,
STEPHEN V. CAREY,
Attorneys for Defendants in Error.

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BRIEF ON BEHALF OF DEFENDANTS IN ERROR

SCOTT Z. HENDERSON,
Attorney for Defendants in Error.

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STATEMENT

The regulatory body having jurisdiction over common carriers in the State of Washington was originally organized as the Railroad Commission of Washington; the Railroad Commission was succeeded by the Public Service Commission of Washington, and this latter Commission was succeeded by the Department of Public Works.

At the time of the filing of the order which brought about this litigation the regulatory body was known as The Department of Public Works, while at the time of the filing of the complaint which brought about the hearing resulting in the order referred to, the regulatory body was known as the Public Service Commission of Washington. The term "Department of Public Works" will be used herein to designate this regulatory body.

According to the pleadings the rates involved herein were given first consideration by The Department of Public Works in cause No. 5092 (fol. 4, trans. 4), which was an order dated August 25, 1920. Plaintiffs in error, hereinafter referred to as the Carriers, failed to conform to the directions contained in the order last referred to and on December 28, 1920 formal complaint was filed and served by the Department in cause No. 5159 (Fol. 1, trans. 1) which brought on a formal hearing April 11, 1921.

The carriers had maintained rates for the transportation of logs, which rates had originated in contracts, some of which contracts had been entered into prior to the time when any regulatory body had been organized in the State of Washington. (Fol. 286, trans. 482.) These various contracts, together with

tariffs filed by the carriers, resulted in many inequalities and inconsistencies, as we will later show by specific reference to the record.

It was the desire of the carriers that these contracts should be eliminated and that the log rates should be placed upon a basis which would have uniformity. The carriers felt morally bound by these contracts and they probably were legally bound thereby until such a time as the Department of Public Works should, by order, direct that said contracts be cancelled. This in a large measure accounts for the failure of the carriers to comply with the directions or order No. 5092, wherein the Department of Public Works called attention to the illogical construction of the log rates and notified the carriers that unless they immediately proceeded to arrange a modification of such rates so as to remove the objectionable features, the Department would of its own motion require a readjustment of the same.

After the filing of the complaint in cause No. 5159, to-wit: on February 14, 1920, in conformity with its usual custom, the Department called upon the carriers for certain information to be used by the Department in preparing exhibits and evidence for introduction at the formal hearing. (Fol. 15-18,

trans. p. 322-323). This information was not furnished but at the time of the formal hearing the carriers attempted to introduce as exhibits certain unverified statements which were claimed to be presented in response to the order of February 14th. (Fol. 15, trans. 322). The Department of Public Works did not permit the carriers to put these unverified statements into the record in such an informal manner and most of them were later placed in the record as exhibits after having been properly verified.

During the course of the hearing the Department of Public Works requested the shippers to present to the Department a uniform tariff which the shippers might consider as reasonable. The Department also requested the carriers to present to the Department a uniform tariff which the carriers might consider as reasonable. Contrary to the statements of the carriers the Department did not request or invite the carriers to file any new tariff for the purpose of bringing on another hearing.

The carriers offered to file as a new case a tariff known in the record now as Tariff No. 29. The filing of such a tariff in such a manner was resisted by the Associated Log Shippers but the carriers refused to present

the tariff in any other manner. The filing of such a tariff would bring on a new hearing and the carriers stipulated that the evidence in cause No. 5159, which was the hearing then in progress, should be considered as the evidence in the new cause. The Associated Log Shippers refused to stipulate anything with reference to the so-called tariff No. 29 and when said tariff was filed a protest against the filing of said tariff was filed by the Associated Log Shippers. (Supplemental Trans. Fol. 18, p. 13).

Thereafter a hearing was held on tariff No. 29. The evidence in cause No. 5159 was considered the evidence to be introduced relative to tariff No. 29; the causes were consolidated and one order made as in causes No. 5159 and No. 5330 consolidated. (Fol. 33½, trans. 15.)

We assume that the Department was entitled to take judicial notice of the location of the railroads and the carriers have filed with their brief a map showing the locations of the railroads. We also assume that the Department was entitled to take judicial notice of the location of the logging roads over which the carriers received the logs. We are attaching to this brief a map marked "A" showing the location of the railroads and the

location of the logging roads west of the Cascade Mountains, which map was used for illustrative purposes in the argument before the Supreme Court of the State of Washington. The carriers are shown in black; the logging roads in red. This map is the first map attached to this brief. We are also attaching a map of the State of Washington, marked "B", which is the official map of the Department of Public Works, showing the railroads in the State of Washington. By reason of reference to the relationship of branch lines to main lines we are also attaching a map marked "C", which was used in argument before the Supreme Court of the State of Washington showing main lines and branch lines of the carriers, the main lines in black and the branch lines in red. Because of the fact that logs are not handled as are other commodities, it may be useful to have a brief description of the manner in which logs are handled.

DEVELOPMENT AND EXTENT OF LOGGING INDUSTRY

In the Northwest and particularly in the State of Washington there has developed an industry described as the commercial logger and it has been stated that in no other section will be found the commercial logger as

he is found in the Northwest. This logger does not own the saw mills but he does own large tracts of timber. He builds his railroad into the timber and connects his railroad with the common carriers referred to. The logger owns the terminal at the place of delivery of logs. The logs are cut in the timber, dragged to a central point and there loaded upon flat cars and these loaded flat cars are taken over the railroad of the logger to the terminal of the logger at the point of delivery to the common carrier. There the loaded cars are picked up by the carrier and taken to tide water where a train load of logs will be unloaded into the water in from thirty to forty minutes and the cars are then ready for service again. The logger in some instances owns the terminal at tide water; in other cases the terminal at tide water is owned jointly by the logger and the carrier. If there should be an instance in which the carrier owns the "log dump" a charge is usually made for the use of this "log dump".

Logs cannot be stored in the timber to await the time when cars are available; the logs are taken directly from the timber and loaded upon the cars as described in the testimony of witness Frost. (Fol. 1052, Sup. Trans. 64.)

Some of the flat cars used in the handling of logs are equipped with what are termed steel bunks, and cars so equipped have a capacity of five hundred feet of logs more than cars not so equipped. (Fol. 1086, Sup. Trans. 81.) Cars not equipped with steel bunks must be equipped by the logger with wooden stakes for the purpose of holding the logs on the car. The cars equipped with bunks may be unloaded without danger as the bunks are "tripped" from the opposite side of the car from which the logs are unloaded. Cars equipped with stakes are unloaded by the process of workmen going along the sides of the cars with axes and breaking the stakes so that when the weight of the logs goes against the stakes the stakes will break and the logs fall into the water. This breaking of stakes is done before the cars are delivered to the log dump, which has one side elevated so that when the car goes on to the log dump the logs will roll off of the car and drop from the lower side into the water. If a workman, in breaking the stakes, cuts them too much and the logs start to move the workman must immediately take refuge under the car or have the logs roll upon him.

In 1920 there were 283 concerns engaged in logging in the State of Washington and of

these 251 had their headquarters west of the Cascade Mountains. At the time of the hearing there were fifty-eight logging concerns operating within the State that shipped logs over the lines of the carriers and of these fifty-five had their headquarters west of the Cascade Mountains. In 1919 the pay roll of the lumber and timber industry within the State was $88,529,942.00. The State of Washington is the heaviest lumber producing State in the Union, cutting approximately fifteen per cent of the total lumber manufactured and approximately eighty per cent of the total shingles manufactured in the United States. Approximately thirty per cent of the forest timber converted into lumber and approximately twenty-five per cent of the forest timber converted into shingles is hauled to mills or tide water over the lines of the carriers.

Approximately 1,715,000,000 board feet of logs or 7,100,000 tons or 230,000 cars are handled annually by the carriers within the State. During the year 1920 there was delivered to the carriers at points within the State of Washington approximately 21,000,000 tons of revenue freight, of which approximately 13,000,000 tons or 62% was raw and manufactured forest products and

approximately seven million tons or 33% of revenue freight was logs. (Folios 196-b-2—196-b-3, trans. 91-92.)

For every board foot of logs hauled into the mills by rail for the manufacture of lumber 2.69 board feet were hauled out from the mills by rail as finished products. (Fol. 196-b-5, trans. 93.) Attention is called to the statistics concerning this industry for the purpose of showing the tonnage developed for the carriers.

CARRIERS RATES WERE UNLAWFUL

The contention of the carriers that their rates are not discriminatory is somewhat surprising in view of the fact that the discriminatory character of the rates was admitted before the Department and the Department was requested by the carriers to remove the objectionable features to be bound in the then existing tariffs.

> "We realize that there are a number of inconsistencies in our present rate structure, in that we haul one man's logs, for instance, ten miles and charge him as high or higher a rate than we will another man for fifteen or twenty miles. There are a number of these instances, and a great many of them are made under special conditions, but as a whole, looking at the situation generally, it is my opinion that a distance scale of rates

should be established in this territory which will afford shippers the benefit and advantage of their location." (Witness Mount, Assistant General Freight Agent, O. W. R. & N., folio 245, p. 458.)

"Yes, the general inconsistency of the rates for equal distances that is shown by this exhibit results from the manner in which the log rates were originally made. Also the conditions that control the making of those rates in the early days." (Witness Capron, Assistant General Freight Agent, N. P., folio 286, p. 482.)

"We have lots of rates that are higher for equal distances." (Witness Capron, folio 288, p. 483.)

"That there are inequalities is undeniable, and is sufficiently portrayed in Department's Exhibit A. The important matter for determination is how shall the inequalities be removed." (Brief of N P., filed before the department.)

"That the present rates are lacking in uniformity and in many respects unsatisfactory to both shipper and carrier is fully established by the evidence and is undisputed; and there can be no doubt as to the *duty* and purpose of the department to devise and enter an order removing, as far as practicable, the objectionable features to be found in the existing tariffs." (Brief of Milwaukee, filed before the department.)

Any contention made by the carriers that the Department did not sustain the burden of

proof as to the discriminatory character of the tariffs of the carriers would seem to be met by what has just been quoted and when the tariffs were proven to be and were conceded to be discriminatory the unlawfulness of the tariffs was then definitely established and, as stated by the brief of the Milwaukee, is was the *duty* of the Department to enter an order removing the discriminatory features of the tariffs. Any burden resting upon the Department to prove the unlawfulness of the tariffs was fully met, regardless of whether or not the Department had a right to declare in cause No. 5092 that they did not pass upon the reasonableness of the rates therein involved and that any future challenge to the increased rates would cast upon the carriers the burden of justifying the increase permitted as an emergency matter in said cause No. 5092.

When the carriers filed tariff No. 29 and brought on the hearing in cause No. 5330 with which No. 5159 was consolidated, the carriers were bound to assume the burden of proof, and so it is that the Department sustained the burden in so far as it was required in cause No. 5159 and the carriers were by law compelled to sustain the burden in cause No. 5330. If there is a Federal

question involved relative to the burden of proof the record justifies the assertion that the carriers suffered no prejudice by any rulings of the department or of the Supreme Court of the State of Washington concerning the question of burden of proof.

NO ACCURATE COST FIGURES

Exhibits filed before the Department contained figures and conclusions arranged and calculated in an effort to show large transportation costs for the hauling of logs. It was admitted that the cost of hauling logs could not be determined.

> "Any figures which we would present showing the cost of logging operations would be subject to attack." (Witness Nicholson, General Manager of Milwaukee, folio 157, p. 405.)
>
> "Now, to get at the cost of log traffic, we do not have figures available as to the expense of that particular traffic, and the only way to reach them is to assume the same cost of handling logs as other commodities on the line west of Ellensburg." (Witness Peterson, fol. 363, p. 527.)
>
> "An acceptable demonstration of what is the actual cost to a carrier of transporting a given commodity has yet to be determined." (Western Cement case, 48 I. C. C., 201, 234.)
>
> "It has been my experience that there has never yet been any method evolved,

and I don't know how there ever will be that will accurately reflect the cost of handling any commodity. There are only a very *few* items that you can directly allocate." (Witness Mount, fol. 252, trans. 462.)

"The estimate of the cost is admitted to be uncertain, and to depend in part upon the arbitrary postulates. It has to be increased considerably above the average cost for freight in order to make out the plaintiff in error's point." N. P. Railway Company vs. State of North Dakota, 216 U. S. 579. 54 L. Ed. 624.)

"A. No, I have never in my life produced any statements showing the actual cost of carrying any commodity because it is impossible.

Q. But the O. W. R. & N. has informally presented, not only before this Commission, but before the Interstate Commerce Commission, cost data with reference to transporting the different commodities?

A. So far as they could allocate them, yes, and the majority of those figures are arrived at on an arbitrary basis, even at that." (Witness Mount fol. 272, trans. 475.)

COMPARISON APPROVED BY CARRIERS

It was suggested by the carriers that comparisons would be a reasonable method for testing a rate.

"Now, your unit of comparison is the cost of moving one thousand gross tons. Those are the figures that we cannot get away from." (Witness Nicholson, fol. 157, trans. 405.)

"So the basis which has been prescribed in order to get away from the fine decimal points is based on the cost of moving one thousand gross tons one mile. The figures that enter into arriving at the cost involved statements and calculations from a great many sources. Any of you gentlemen could take any of these statements, and, not understanding how or for what purpose they were prepared, might ask a railroad officer a thousand questions, many of which he could not answer, and in asking questions about railroad statistics, we recognize that you can embarrass almost any railroad officer, whether he be an accounting or operating man, or whoever he may be. *But when it is all summed up, you have operated your railroad at a given cost. You have moved so many thousand gross tons in doing so, or in other words, you have spent your money and bought so many thousand gross tons. You can very easily determine your cost per thousand gross tons, and that is the real foundation of all your railroad accounting, to determine what that cost is.*" (Witness Nicholson, fol. 151, trans. 402.)

It would be difficult to find a better statement for a reason for using the cost of transporting one thousand gross tons in the state

of Washington as a basis for testing the log rate than the statement above quoted from the lips of one of the operators of one of the carriers involved.

It being, as stated by Mr. Nicholson, an easy matter to determine the cost per thousand gross ton miles, it is as easy to determine the revenue upon the same basis. If it costs no more to move logs than it does any other traffic which moves in volume, then it costs no more to move logs than it does the average commodity, it being admitted that traffic which moves in volume moves at a less unit cost than traffic which does not move in volume. If the revenue derived from the log traffic is as great per unit as the revenue derived from the average unit, then the log traffic must be bearing its share of the transportation cost of the railroad. To use Mr. Nicholson's example, if it cost no more to buy a thousand gross tons of logs than it costs to buy a thousand gross tons of the average commodity, and the thousand gross tons of logs produces as much to the carrier when sold in net tons as a thousand gross tons of the average commodity, then the log traffic is bearing its share of the operating cost of the railroad.

LOG COST NOT HIGHER THAN OTHER TRAFFIC

Mr. Turnburke, who was charterized by the carriers as one of the most competent witnesses on the stand, testified, (Fol. 860, Trans. 807) that the expense of moving logs is approximately the same as for handling any other traffic that moves in volume.

If there were nothing in the record to indicate that the cost of hauling a thousand gross tons of logs is no greater than the cost of hauling the average commodity, the use by the department of the average unit cost figure might not be conclusive, although until it is definitely established that it cost more to haul logs than average traffic the department must be sustained.

The carriers have admitted that their log tariffs were discriminatory, and the record conclusively shows this to be a fact. Therefore, the tariffs of the carriers are unlawful and must be superceded by a lawful tariff. The department has prescribed such a tariff, and the carriers are seeking to have the department schedule overthrown, and in their attempt to accomplish this purpose, contend that because the average *cost* of moving a thousand gross tons of all traffic is *less* than the *revenue received* for the moving of a thousand

gross tons of logs, the conclusion does not *necessarily* follow that the rate producing such revenue is sufficient for logs.

While this bare contention may have some merit, it is not sufficient to overthrow the rate fixed by the department. Such a statement is indicative of a reasonable rate as indicated by the Supreme Court of the United States in the case of the *Northern Pacific Railway Company vs. State of North Dakota*, 216 U. S., 579, heretofore quoted.

With evidence in the record to the effect that it costs no more to move logs than it does any other traffic that moves in volume, and with an admission to this effect by one of the principal witnesses for the carriers, the fact that the revenue derived from the hauling of logs is in excess of the cost of transporting one thousand gross ton miles of all traffic, *is conclusive* proof that the rate producing such revenue is not confiscatory and not unreasonable.

COST OF LOG TRANSPORTATION BELOW AVERAGE

As stated by Mr. Nicholson, a carrier witness, the railroads have been operated for a certain period, and it has cost so much money with which money, the carriers have moved so

many thousand gross tons, or have bought so many thousand gross tons. Therefore, as stated by the carriers, it is an easy matter to determine the cost of one thousand gross tons. Naturally, there are certain kinds of commodities that cost more than the average, such as fruit and perishable goods that move in refrigerator cars; time freight that must be delivered quickly; goods that are subject to damage and demand extra protection; commodities that must move in closed cars, and that are subject to damage by the slightest kind of reckless handling; goods for which there must be storage provided in freight houses prior to loading and after unloading; bulky goods that occupy much space and weigh little, and numerous other kinds of commodities. These commodities, thrown in with the low grade commodities, such as logs that move on cheap equipment; that are not subject to damage charges; that are picked up, if lost, at the expense of the shipper; that do not make extensive uses of terminals, the shipper owning always the terminal at one end, and in some instances the unloading terminal; that are delivered in commodities of several car loads lots at one time; and that do not require extensive switching operations, will bring up the average cost to a

figure which is above the cost of moving the low grade traffic, such as logs, and down to a figure which is something less than moving the high grade traffic.

It must be apparent, therefore, that to apply the average cost to the low grade traffic would be to apply a figure which is in excess of the actual cost, and this is exactly what the department has done in applying to the log traffic, for purposes of comparison, the average cost of moving the unit of one thousand gross tons.

Since it has been established that the unit of cost is the gross ton mile, or preferably the unit of one thonsand gross ton miles, it follows that the application of this cost unit to the moving of traffic is a proper method of testing rates. Let us therefore, use the gross ton as we would a dollar. That is to say, let us ascertain how many gross tons are required to secure a net ton. As an example, if it requires the hauling of one hundred gross tons to secure fifty net tons of a particular commodity, the cost of hauling this particular commodity would be in excess of the cost of hauling a commodity that required only the

moving of seventy-five gross tons to secure fifty net tons.

Let us apply the example above suggested to the movement of all freight as compared to the movement of logs.

By Associated Log Shippers revised exhibit No. 4, (fol. 196A-10, trans. 89), the total gross ton miles of all freight on each carrier is shown, as is also the grand total gross ton miles for the four carriers. This exhibit also shows the total net ton miles of each carrier, and the grand total, likewise the tare ton miles. This same exhibit shows the gross ton miles of logs, the net ton miles of logs, and the tare ton miles in the log traffic, for each carrier and the grand total for the four.

The gross ton miles of all traffic handled by the N. P. was approximately 193% of the total net ton miles; on the G. N., 204%; on the Milwaukee, 205%; on the O. & W., 197;% on the combined traffic, 198%. In case of the log traffic, the gross ton miles on the N. P. was only 187% of the net ton miles; 202% on the G. N.,; 193% on the Milwaukee; 183% on the O. & W., and 191% on the combined systems.

That is to say, on the N. P. it was necessary to haul 187 gross tons of logs to produce 100 net tons; while in the case of the traffic

as a whole, it was necessary to haul 193 gross tons to produce 100 net tons, showing an advantage in the case of the log traffic of approximately six per cent. On the G. N. it was necessary to haul 202 gross tons of logs in order to get 100 net tons, as compared with 204 gross tons of the average traffic required to produce 100 net tons. On the Milwaukee it was necessary to haul 193 gross tons of logs to produce 100 net tons; while in the case of the average traffic, 205 gross tons were required to produce 100 net tons. On the O. & W. it was necessary to haul 183 gross tons of logs to produce 100 net tons; while in the case of the average traffic, 197 gross tons were required to produce 100 net tons. Considering the combined traffic, it was necessary to haul 191 gross tons of logs to produce 100 net tons; while in the case of the average traffic, it was necessary to haul 198 gross tons in order to get 100 net tons.

If 100 net tons of all traffic could have been purchased for the same number of gross tons as was required to purchase a net ton of log traffic, then the total gross ton miles of all commodities moved within the State would have been 8,279,733,600, instead of 8,589,577,958; an apparent saving of 309,844,358 gross ton miles, which, at the average operat-

ing cost of $6.090 per 1000 gross ton miles, would have reduced the total cost of operation by $1,886,952. After making due allowance for those portions of operating cost not materially affected by fluctuations in traffic, it still remains a fact that *had the same ratio existed between the gross ton miles and the net ton miles of all traffic, as existed between the gross ton miles and the net ton miles of log traffic, a substantial reduction in operating costs would have resulted.*

EACH CARRIER EARNS PROFIT ON LOGS

The profitable character of the log traffic for each carrier may be demonstrated by the use of the following undisputed figures. The following table taken from C. M. & St. P. Brief, pages 75 and 76, shows the revenue per 1,000 feet of logs, and the operating costs per 1,000 gross ton miles in the State of Washington:

	Revenue per 1000 ft.	Cost per 1,000 gross ton miles.
N. P. Ry.....	$.05314	$5.508
G. N. Ry.....	.07084	6.970
C.M.&St.P.Ry.	.07006	6.105
O.W.R.&N.Ry.	.10256	6.609

1,000 feet of logs equals 8325 lbs. N. P. Ex. No. 7. (Fol. 205, trans. 98.)

Therefore, one thousand tons equals slightly more than two hundred forty thousand feet.

On the N. P. it was necessary to haul 187 gross tons of logs to get 100 net tons; on the G. N. 193 gross tons to get 100 net tons; on the C. M. & St. P. 193 gross tons to get 100 net tons; on the O. W. R. & N. 183 gross tons to get 100 net tons.

It must be apparent therefore that to multiply the revenue for hauling 1,000 feet of logs one mile by 240, or the number of thousand feet in 1,000 tons, will give the log revenue for transporting 1,000 tons of logs one mile. Since it requires the transporting of the gross tons shown above for each carrier to get the revenue from a net ton it follows that the cost of 1,000 gross ton miles multiplied by the required number of gross tons to produce a net ton will give the cost per net ton. Following are the results:

N. P. .....240 by $.05314 equals $12.7536
Revenue per 1000 net ton miles of logs.
187 by 5.508 equals 10.2996
cost

Net per 1000 ton miles logs $2.4540
G. N.....240 by $.07084 equals $17.0016
2.02 by 6.97 equals 14.0794

Net per 1,000 ton miles logs .....$ 2.9222

C. M. St. P....240 by .07006 equals $16.8144
1.93 by 6.105 equals 11.78265

Net per 1,000 ton miles logs $5.03175
O. W. R. & N. 240 by .10256 equals $24.6144
1.83 by 6.609 equals 12.09447

Net per 1,000 ton miles logs $12.51993

Net tons miles of logs by profit per net ton miles gives profit for each carrier. Net tons found in Associated Log Shippers Revised, Ex. 4, Fol. 196A-10, p. 88, and not disputed.

N. P.	102,290.904×$2.454=	$251,021.88
G. N.	18,712.757×$2.922=	54,682.42
C.M.&St.P.	60,455.454×5.03173=	304,185.52
O.W.R.&N.	8,060,976×12.51993=	100,922.74
Net profit log traffic		$710,812.56

Compare this with figures of profit in Associated Log Shippers, Revised, Ex. 4 Fol. 196A-10, Trans. 88).

SHORT HAUL IS PROFITABLE

Much has been said in the briefs of the carriers about the long traffic being more profitable than the short haul traffic. By an examination of Associated Log Shippers revised Exhibit No. 2, (Fol. 196A 7, trans 86), it will be discovered that there may be some doubt as to the profitableness of the long haul

over the short haul. By this exhibit, it will be noted that the average haul per loaded car for the N. P. was 31.38 miles. The average haul for the O. & W. was 15.02 miles. The revenue per loaded car on the N. P. was $12.88; on the O. & W. $12.55. However, when we come to the revenue per loaded car mile, we find that the revenue on the N. P., with a haul of 31.38 miles is $0.40997, while the revenue per loaded car mile on the O. & W., with a fifteen mile haul, is $0.83556, or more than twice as much, and the revenue per net ton mile for the N. P., with the long haul, is $0.01279, while on the O. & W., with the short haul, is $0.02474.

It is also interesting to note that the profit for one thousand net ton miles of logs on the N. P. is $2.454 while the profit per one thousand net ton miles on the O. W. R. & N. with its short haul business is $12.51993.

Associated Log Shippers Revised Exhibit No. 3 (fol. 196A-8, trans. 87), shows that the revenue per 1000 net ton miles of log traffic was greater than the revenue per 1000 net ton miles of all traffic. With reference to the O. & W., the revenue per 1000 net ton miles of logs was in excess of the revenue per 1000 net ton miles of intrastate traffic other

than logs, and the O. & W. has by far the shortest haul.

EXCESSIVE CHARGE TO WASHINGTON

By referring to Associated Log Shippers revised Exhibit No. 3-A, (fol. 196A-9, trans. 89), it will be noted that the operating cost per 1000 gross ton miles charged to the state of Washington, is approximately 36% in excess of the operating cost per 1000 gross ton miles as charged to the combined operating system, in all states. Therefore, it is clear that the unit operating cost (per 1000 gross ton miles) charged to that portion of the combined system outside the state of Washington must be considerably less than the unit cost assigned to the combined system as a whole. Assume the unit operating cost for the combined system, all states, to be 100; the corresponding unit cost assigned to the state of Washington (Exhibit No. 3-A) is 136; so that the unit cost assigned to those portions of the combined system outside the state of Washington must be less than 100. In the text explanatory to Exhibit No. 3-A (Fol. 196A-9, trans 89), it is shown that the operating cost of handling 1000 gross ton miles charged to the state of Washington is 43% in excess of the corresponding unit

operating cost charged to those portions of the combined system outside of the state of Washington. It will be noted that in Revised Exhibit No. 4, (fol. 196A-10, trans. 88) the operating cost as assigned to the state of Washington by the carriers was used as a basis of calculations.

In the text explanatory to Revised Exhibit No. 4, it was shown that if the unit cost of handling log traffic within the State was not more than 45.8% in excess of the average unit cost of handling all traffic within the State, then during the year in question, the log traffic was exactly on a par with the total traffic within the State and earned at the same rate per gross ton mile as did all other traffic. If we assume, as has been demonstrated, that it costs no more per 1000 gross ton miles to move logs than it does to move 1000 gross ton miles of the average traffic, then the operating cost assigned to the log traffic, (in Revised Exhibit No. 4) could be increased 45.8% before the financial advantage shown as accruing to the log traffic would be wiped out—at which point such log traffic would begin to earn or lose at exactly the same rate as the total traffic within the State.

Consider then, that in computing the cost of handling the log traffic within the state on

the basis of the average unit operating cost within the state, (as was done in Revised Exhibit No. 4,) that the unit cost used was 43% in excess of the average unit cost charged to all traffic on the four systems outside the state of Washington. Then consider that even this excessive unit cost as applied to the log traffic could be increased by approximately 46% before the financial advantage shown for the log traffic would be wiped out and before it would be on an equal earning basis with all other traffic; and then consider the very substantial advantage accruing to the log traffic in that it requires considerably less gross ton miles to produce net ton miles, than in the case of the average traffic; and consider that the carriers have repeatedly contended that the actual cost of handling the log traffic is not known and cannot be ascertained; then it is clear that the operating expense calculation made by the Department in testing the log rate was decidedly in favor of the carriers. Taking all of the fact into consideration, it is seen that the log traffic of the state of Washington could be charged with a unit operating cost approximately *70% in excess of the average unit cost charged to the combined system* of the four carriers, (all states) before the log traffic would lose its financial

advantage and before it reached a point where it would earn or lose at the same rate as all other traffic.

Attention is called to the fact that the Department has never attempted to show definitely the actual cost of handling lots as it is impossible to make such a showing. The assertion of the carriers that the use of the average cost could be applied to any commodity and thereafter the cost of any commodity shown, is not justified. The Department only assumed that the evidence was conclusive that the cost of transporting one thousand tons of logs one mile was not greater than the average cost of transporting one thousand tons of other traffic. When the exhibits last referred to used the average cost in the State, which includes the cost of handling cars across the Cascade Mountains, and applied that cost to the log traffic which moves exclusively west of the Cascade Mountains, a sufficiently large cost was used to represent the cost of handling logs. The Interstate Commerce Commission has considered the grades over the Cascades of sufficient importance to justify a ten per cent differential in freight rates between the Inland Empire east of the mountains and Puget Sound as compared with the rates between

the Inland Empire east of the Mountains and Portland, Oregon. Inland Empire Shippers League is Director General. 59 I. C. C. 321.

VARIOUS EXPERT METHODS

To again refer to the exhibits of the carriers and to the statement made by Mr. Nicholson concerning them, a thousand embarrassing questions may be asked relative to such exhibits. By the same token as many arguments can be made for or against the carriers by an attempted analysis of such exhibits. As an example, N. P. Exhibit No. 41 (fol. 231, trans. 175) demonstrates that results are dependent on the method used. This exhibit shows on the estimated car mile basis there would be a paper deficit of $522,735.00, while on the actual gross ton mile basis, the deficit is shown to be only $288,-054.00. G. N. Exhibit No. 23 (fol. 396, trans. 295) shows what can be done when an attempt is made to pick out a few so-called solid train load movements, each a small fraction of a normal train, and assign cost by a combination of methods, although the evidence clearly shows that logs did not regularly move in solid trains of from nineteen to twenty-four cars.

Great Northern Exhibit No. 16, (supplemental trans. fol. 387, page 23) shows the

estimated cost of handling logs on Spokane, Marcus and Cascade Divisions in Washington for the Great Northern. This Exhibit was omitted in the printing of the record in volumes I and II. It shows that the net income for three months of 1920, namely: September, October and November, was $7,-134.44, while Great Northern Exhibit No. 23, which was an attempt to pick a few so-called train load movements and which was printed by the carriers (fol. 396, pages 295-296) indicates a net loss from the handling of logs. It will be observed that Great Northern Exhibit No. 23 relates to small fractions of normal trains and that costs are assigned by combinations of methods.

The figures presented by the carriers relating to costs are for the year 1920, which, it was admitted, was the most abnormal year in the history of the nation, and particularly in the history of the railroad operation. No figures were given to the department which would assist in making any determination as to normal costs or normal revenues. Everything presented by the carriers was on an admittedly abnormal basis.

It was admitted that a very large percentage of logging traffic was hauled on contract or so-called commodity rates. The heaviest

shippers were accorded a rate far below the paper distance tariff, and the evidence showed that the actual transportation charge in every instance was in excess of either the contract rate or the tariff rate by reason of the inability of the shipper to load to the minimum.

Representative cost figures built upon a hypothetical movement of logs were introduced by the Milwaukee, which figures were less than the carriers actually received, as will be hereinafter demonstrated.

ASSOCIATED LOG SHIPPERS FIGURES CORRECT

Every figure shown in the exhibits prepared by Mr. Gray for the Associated Log Shippers is correct. It is true that at the beginning of the hearing, the carriers had not furnished correct figures, and therefore, as the carriers did furnish further figures which they contended were correct, Mr. Gray had to make corrections in his exhibits.

With reference to Associated Log Shippers revised Exhibit No. 4, (fol. 196A-10, trans. 88), some criticism was offered by Mr. Turnburke at the hearing, and considerable space is given to an attack upon this exhibit in the briefs of the carriers. Assuming that it might be fair to assess a part of the cost of

handling non-revenue freight against the log traffic, it is a difficult problem to determine what portion should be so assessed.

It is probable that by far the greater part of the non-revenue tonnage transported within the state in 1920 by the carriers was outwardbound from the state of Washington, instead of being inbound thereto. During that year there was no heavy maintenance or rehabilitation work which would require any extensive shipments of rails, fastenings, bridge steel, etc., into the state. The Chicago-Milwaukee was electrified from Othello west, and its haul of fuel was a minimum. The G. N. and the O. & W. obtained the greater part of their fuel, viz., coal, from the state of Washington, and the former road certainly must have shipped a large tonnage of coal to points without the state. Unquestionably, in the case of every carrier, there was a large quantity of ties, timber and lumber destined for the use of the carriers, shipped to points without the state. This will be apparent when it is remembered that after leaving the state of Idaho, there is no available timber until Minnesota, is reached, and the supply from that state is more or less limited. Therefore, a very considerable portion of the non-revenue freight handled without the state

of Washington must have been of an interstate character, and the cost of handling such freight really should be assigned to interstate business.

The easiest way to assign to the log traffic a proportionate part of the cost of transporting this non-revenue freight is to make such assignment upon the basis of the relation borne by the gross ton miles of log traffic to the gross ton miles of revenue traffic within the state. This would result, in the case of the four principal carriers, of assigning approximately $407,000.00 additional operating cost to the log traffic. It is quite unbelieveable that the log traffic, operating as it does over short hauls, and in a limited area, making very little use of the extensive terminals which consume a substantial portion of the non-revenue freight, should be held responsible for anything like this portion of the cost of handling the non-revenue freight.

However, the gross ton mile basis of apportionment is contended for by the carriers, and figures have been presented with the idea of sustaining this contention. Possibly some part of the cost of transporting non-revenue freight should be assessed against the log traffic, but no one knows what part should be so assessed, and it is certainly not unfair

to the carriers that the apportionment of the cost of hauling non-revenue freight between the log traffic and other revenue traffic, should be made upon the basis of the respective gross ton miles of each. This would be quite extreme, and very unfair to the log traffic. In order to show the result of such an extreme apportionment, the following table in which the cost of handling non-revenue freight has been apportioned upon a gross ton mile basis, may be useful. The figures shown therein are correct enough from a matematical standpoint, but it is not considered that it would be entirely fair to the log traffic to use them as they stand. However, it will be noted that these figures in effect do not alter the situation, for they also show a net gain for log traffic, and a net loss for other revenue traffic.

APPORTIONMENT OF COST OF HANDLING NON-REVENUE FREIGHT STATE OF WASHINGTON YEAR 1920

	Northern Pacific	Great Northern	Chicago Milwaukee	Oregon-Wash.
Calculated Cost of Hauling Non-Revenue Freight	$3,934,681	$1,573,387	$1,534,554	$272,349
Gross Ton Miles, Log Traffic, Divided by Gross Ton Miles, Total Revenue Traffic	6.08	2.27	7.68	1.59

Maximum Non-Revenue Freight Operating Cost Assignable to Log Traffic	$ 239,228	$ 36,017	$ 117,854	$ 13,870
Minimum NET GAIN from Log Traffic, assuming Unit Operating Cost to be the Average	$ 14,350	$ 17,770	$ 200,029	$ 88,133
Minimum NET LOSS from Revenue Traffic Other than Logs	$1,180,634	$3,062,491	$3,656,169	$844,963

RECAPITULATION

Calculated Cost of Hauling Non-Revenue Freight	$7,914,971
Gross Ton Miles, Log Traffic, Divided by Gross Ton Miles, Total Revenue Traffic	5.14
Maximum Non-Revenue Freight Operating Cost Assignable to Log Traffic	$ 409,969
Minimum NET GAIN from Log Traffic, assuming Unit Operating Cost to be the Average	$ 320,282
Minimum NET LOSS from Revenue Traffic Other than Logs	$8,744,257

ASCERTAINABLE FACTS

Carriers made the positive and flat assertion that the cost of transporting any commodity cannot be ascertained, and then the briefs attempt to show that the method employed by the carriers is more correct than that employed by the department. It must be remembered that carrier witnesses testified repeatedly that accurate costs could not be ascertained, and that comparisons were more reliable than cost approximations. Therefore, the department did not undertake the

impossible task of ascertaining the cost of moving logs. The department did ascertain these facts:

In the log traffic, the loaded cars move down hill. It has been suggested by the carriers that there is not evidence in the record upon which such a finding could be based. We insist that there is plenty of such evidence in the record. However, assuming for the sake of argument that no such evidence was in the record, it does not require evidence to prove that water runs down hill. Logs moving to tide water move down hill as certainly as water flows down hill. It requires no evidence to prove that the great forests of the State of Washington are not below sea level.

Logs move in the cheapest equipment which the carrier owns.

Logs do not move across the mountains.

It takes about forty minutes to unload a trainload of logs and deliver the train of cars back into the service of the carrier.

Logs are delivered to the carrier in lots of from ten to twenty cars, and are thus handled with less expense than other traffic, as testified by Mr. Dow for the Milwaukee.

The logger always owns the terminal at one end of the haul and usually has a joint arrangement for the ownership of the terminal at the other end of the haul. (Fol. 187, trans. 422.)

Logs that are lost in movement are picked up at the expense of the shipper. (Fol. 497, trans. 576.)

From 65% to 80% of the business of the carriers originating in the State of Washington originates with the logs.

It requires fewer cars in the log traffic, compared to the amount of business handled, than is required in other traffic, as shown by the testimony of the witness Albee, Superintendent, Tacoma Division of the N. P., (fol. 455, trans. 580).

By an examination of N. P. Exhibit No. 25 (fol. 216, page 111) it will be observed that the number of cars of logs loaded in September, 1920 on the Tacoma Division was 6,667. Northern Pacific Exhibit No. 28 (fol. 219, page 114) attempts to show the proportion of cars of logs to other loaded cars handled through the terminals of the Tacoma Division for the month of September, 1920, the same month as recorded in N. P. Exhibit No. 25. On Exhibit 28 the total cars of logs

handled is shown as 3768, leaving 2899 cars unaccounted for. By the same exhibit No. 25 above referred to it will be ascertained that the month of March, 1920, the number of cars loaded on the Tacoma Division was 5847. In N. P. Exhibit No. 27, (fol. 218, page 113) the cars handled through the Tacoma terminals for the month of March, 1921, is shown to have been 3015. If we assume that the same number of cars were handled in March, 1921, as were handled in March, 1920, there are 2832 cars to be accounted for. If, during the month of March, 1921, there was approximately the same number of cars of logs loaded as in March, 1920, the percentage as shown in Exhibit No. 27 referred to would be materially altered. We assume that cars are repaired at the terminals or that they are set on the repair track for repairs at the terminals. It may be remarked that since, according to the exhibit 25 referred to, there were 6667 cars of logs loaded in September, 1920, and that in the same month there were only 3768 cars handled through the terminals, there were 2899 cars that needed no repairs in that month. If we assume that in the month of March, 1921, the Tacoma Division handled as many cars of logs as they did in March, 1920, namely:

5847, it must be apparent that since exhibit No. 27 only shows 3015 cars handled at the terminals there must have been 2832 cars that did not need repairs.

The log traffic has resulted in overcoming for the carriers the large west-bound empty car movement prevailing prior to the time when the railroads began selling their timber to produce east-bound traffic.

The operating figures introduced by carriers were for the year 1920, which was the most abnormal year in the history of railway operations.

Some criticism has been offered because it is claimed the Department of Public Works referred to the year 1920 as a abnormal year in freight operation and it has been asserted that the evidence does not justify such an assumption. The Interstate Commerce Commission has taken judicial notice of the abnormal conditions of 1920 and there was evidence in the record concerning the abnormal cost conditions prevailing in 1920. (Fol. 818, trans. 786.)

It is hardly to be expected that regulatory bodies and courts are compelled to close their eyes to facts of common knowledge and to facts which are published in circulars by the railways. For example: In a pamplet pub-

lished by the Association of Railway Executives under date of November 19, 1924, and circulated generally throughout the United States, we find the following under the title "Railroad Operation under the Transportation Act"; (Taken from page 4 of said pamphlet):

> "The operating ratio, which in 1920 was 94.32 per cent, declined in 1921 to 82.71 per cent, in 1922 to 79.41 per cent, and in 1923 was again reduced and stood at 77.83 per cent; thus indicating a marked improvement in the economy of operation. As compared with 1920, there was an increase in 1923 of 2,367,183,000 car miles. At the same time there was a decrease in operating expenses in 1923 as compared with 1920 amounting to $932,-391,146."

The fact that the Interstate Commerce Commission and the State Commissions found, upon the representation of the carriers, that there was an emergent condition prevailing in 1920 which justified emergency percentage increases, is evidence of the abnormal conditions prevailing in 1920. Mr. Julius Kruttschnitt, Chairman of the Board of Southern Pacific Company, in his testimony before the Senate Committee on Interstate Commerce, showed that the wages per employee in 1920 were 204 per cent of what they were in 1916; that the wages per traffic

unit in 1920 were 216 per cent of what they were in 1916; that the total wages for 1920 were 255 per cent of what they were in 1916. (Bulletin No. 4 issued by authority of the Association of Railway Executives). This Bulletin was issued prior to the order concerning which the carriers complained.

Mr. Turnburke, for the Great Northern, testified that labor costs are by far the largest cost item. (Fol. 838, trans. 796.) Cost figures for such an abnormal year could hardly be representative.

CARRIERS FIGURES NOT ACCURATE

It being admitted by the carriers that their cost figures are not accurate, and it being stated by their witnesses that they are subject to attack, and it being stated by their witnesses that no method has been found of calculating the cost of moving a commodity, there being but few items that can be correctly allocated, the department would be justly entitled to censure for accepting as cost figures such calculations as those produced by the carriers. The commission is not bound to accept, and neither is the court obliged to accept, for the purpose of overthrowing an order of the Department of Public Works, calculations and approximations

which the carriers proclaim are far from accurate.

The facts and figures referred to by the department, gathered from the exhibits of the carriers and from their annual reports and applied by the department members with their knowledge of conditions, taking into account those things of which they are entitled to take judicial notice, and which are matters of common knowledge, are far more conclusive with reference to the reasonableness of the rates prescribed by the department than are the admittedly inaccurate figures of the carriers.

DEPARTMENT FIGURES SUSTAINED

With the log traffic conducted practically in its entirety west of the Cascade Mountains; with the loads moving down-grade; with no particular use of terminals owned by the carriers, producing by far a larger volume of business than any other traffic; delivered to the carrier in from ten to thirty car load lots; with log equipment producing a greater percentage of business than other equipment what justification can there be for saying that the cost of moving the log traffic is greater than the cost of moving the average traffic on the system?

And still, the cost unit used by the department for comparison is 43% greater than the cost unit on the system outside of the State of Washington, and the carriers want a larger cost unit, and this increased cost unit would still have to be increased 45.8% before the log traffic would be on a par with all traffic in the state.

The carriers assert that there is no evidence in the record that it costs no more to move logs than it does other traffic, and they make this assertion in the face of the foregoing facts and the testimony of their own witness, Turnburke, that it costs no more to move logs than it does any other traffic that moves in volume.

The language of this Court used in *Interstate Commerce Commission vs. U. P. R. Co.*, 222 U. S., 541, 54 L. Ed. 308-312, is applicable to this case.

> "There was evidence as to the value of the road, the amounts expended in betterments and paid out in dividends, ratio between the increased earnings and increased expenses, with many tables and estimates tending to show the cost of hauling empty cars, fully loaded cars, and those carrying an average load.
>
> "With that sort of evidence before them, rate experts of acknowledged ability and fairness, and each acting indepen-

dently of the other, may not have reached identically the same conclusion. We do not know whether the results would have been approximately the same. For there is no possibility of solving the question as though it were a mathematical problem to which there could only be one correct answer."

ONLY JUST METHOD TO FOLLOW

The language of this Court in *Northern Pacific Railway Company vs. State of North Dakota*, 216 U. S., 579, 54 L. Ed. 624, also may be applicable.

> "The estimate of the cost is admitted to be uncertain, and to depend in part upon arbitrary postulates. *It has to be increased considerably above the average cost for freight in order to make out the plaintiff in error's point.* (Ital. ours.) The great difficulty in the attempt to measure the reasonableness of charges by reference to the cost of transporting the particular class of freight concerned is well known and often has been remarked. It seems to us that the nearest approach to justice that can be made at this time is to follow the precedent of *Wilcox vs. Consolidated Gas Co.*, 212 U. S., 53 L. Ed. 382, 29th Sup. Ct. Rep. 192, as nearly as may be and affirm the decree, but without prejudice to the railway company to reopen the case by appropriate proceedings, if after adequate trial, it thinks it can prove more clearly than at present the confiscatory character of the rates for coal."

Applying what was stated in the case of *Northern Pacific Railway Company vs. North Dakota, supra,* the cost of hauling logs has to be increased greatly above the average cost for freight in order to make out the point urged by the carriers, and yet there was not one scintilla of competent evidence to indicate that the cost of hauling logs is greater than the average cost. On the contrary, the evidence indicates that from a cost standpoint, it is the cheapest class of freight handled, and, therefore, in reason, the cost thereof could not be greater than the average.

CARRIER EXHIBITS INCONSISTENT

During the several hearings, the carriers introduced eighteen exhibits dealing with the cost of hauling logs. One of these exhibits, or Chicago-Milwaukee No. 16, (Fol. 309, Trans. 204) was based upon a hypothetical movement. Another exihibit, or G. N. No. 23, (Fol. 396, Trans. 295) was introduced as being an actual study, but in reality it was an expense apportionment, all expenses other than car repairs and taxes having been apportioned to the log traffic upon the basis of some form of traffic movement, such as the loaded car mile, train mile, or locomotive mile.

In the case of the sixteen remaining exhibits, the total expenses affecting the log traffic were apportioned to that traffic either upon the basis of the gross ton mile, or the loaded car mile, or the net ton mile. It should be noted that G. N. Exhibits 16 (Supp. Trans. Fol. 387, p. 231) and 23 directly contradict each other.

G. N. Exhibit 16 shows a computation for the months of September, October and November, 1920, which shows a profit over operation of $7,134 from the handling of logs. During the year 1920, the G. N. within the State of Washington, incurred a freight transportation loss of $4,577,345. But as the increases of August 26 were not in effect until that date, let it be assumed that the actual freight revenue of $10,176,076 would have been increased by $1,573,924, making a total probable 1920 freight revenue, had the 25 per cent increase been in effect throughout the year, of $11,750,000, so that the loss would have been only $3,003,421. So that from the carriers own figures the log business is earning a net over operation of approximately $7,134 per quarter, while on the traffic as a whole, the loss is approximately $750,000 per quarter.

N. P. Exhibit 17 (Fol. 210, Trans. 100) attempts to show that during the months of September, October and November, 1920, the loss from log traffic was $1,443; this trifling loss would be much more than wiped out by the wage adjustments made by the Labor Board; in fact, the application of the calculation shown by Exhibit 17-A (Sup. Trans. Fol. 211, p. 7), would eliminate this loss, but as both Exhibit 17 and 17-A relate to three months only, it seems advisable to proceed to Exhibits 18 (Fol. 212, Trans. 103), and 21, (Fol. 215, Trans. 108), which deal with the full year 1920, during which period the sworn statements of the N. P. show that its loss from freight transportation was $1,165,784.

An attempt is made to show by Exhibit 18 that during the period in question, excluding the freight operating expenses to the Puget Sound Terminals, the log traffic lost $318,047, or in other words, the log traffic was responsible for 27.3 per cent of the total loss; but it so happens that the log traffic carried by the N. P. during the year 1920 constituted 31.9 per cent of the total tonnage hauled by that carrier within the State of Washington, and it seems reasonable to presume that if 32 per cent of the tonnage

is responsible for only 27 per cent of the loss, the remaining tonnage must be less profitable than the log traffic.

NICHOLSON'S FIGURES SUSTAIN DEPARTMENT

The exhibits previously mentioned are interesting, but they are lacking in that they make no pretense of showing what might be considered as a reasonable cost for hauling logs. Mr. Nicholson, General Suerpintendent of the Chicago, Milwaukee & St. Paul, is the only witness for the carriers who has expressed an opinion as to what reasonable cost might be. His opinion is as shown in his calculations contained in Chicago Milwaukee Exhibit 16. (Fol. 309, Trans. 204).

Mr. Nicholson's calculation is based upon a traffic of only 20 loads daily, for 26 days per month; a haul of 30 miles, an average loading of 7,826 board feet per car; and a weight of 4.105 tons per M board feet. Mr. Nicholson's calculated total monthly cost for a traffic of this kind and magnitude was $8,344, which included all investment charges and taxes. Upon the basis of 26 days operation, this would amount to $321 per day. The daily gross ton miles handled under such an operation, assuming the average weight

of the Milwaukee flats to be 15 tons, would be 35,945; therefore Mr. Nicholson's estimated cost of hauling logs per thousand gross ton miles, including all fixed charges, would be $8.93, the corresponding cost, excluding fixed charges, being $6.28.

The following table shows the revenue received by the four principal carriers, per thousand gross tons of log traffic handled in Washington in 1920, as compared with Mr. Nicholson's estimated total proper costs of $8.93 and $6.28:

N. P.	$ 6.83
G. N.	8.40
C. M.	8.82
O. W.	13.50
Combined	$ 7.92

TURNBURKE SUSTAINS DEPARTMENT

G. N. Exhibit No. 24 (Vol. 2, Fol. 397, p. 305), is a computation made by Mr. Turnburke, ostensible for the purpose of showing the result of assigning to the log traffic, a certain portion of the cost of handling non-revenue freight. However, Mr. Turnburke, in making this computation, managed to assign to the log traffic considerably more than its part of the cost of handling non-revenue freight.

There is shown the apportionment of taxes paid by the four principal carriers, assignable to the State of Washington. In the first instance, it should be noted that the revenue figures shown in Columns 1 and 2 do not include any part of the aggregate non-operating revenue collected by the carriers, amounting to $12,291,544. If the apportionment of taxes is to be made upon the basis of gross revenue, then this should receive consideration. When prorated to the State of Washington upon the relation of the system gross revenue and the state revenue as shown, it is seen that of the non-operating revenue, 15.50 per cent, or $1,905,189, should be assigned to the State of Washington, increasing the revenue shown for that state to $70,246,024.

Mr. Turnburke shows the total operating cost assignable to the log traffic, including its calculated portion of the cost of handling non-revenue freight, to be $2,602,111. The correct maximum figure is only $2,538,467, or $63,644 less than that shown by Mr. Turnburke.

After having arrived at what he considers to be the total operating cost per thousand gross ton miles, he then decides to determine the cost per thousand net ton miles, for pur-

poses which will be apparent later. He thereupon applies to the average cost per thousand gross ton miles a series of factors representing the relation between the weight of the equipment, and the weight of the freight loaded thereon; and in this manner arrives at what he apparently considers to be the unit cost of hauling logs, as compared with the unit cost of hauling all other commodities within the state. *It is interesting to note that according to his computation, the unit cost of handling logs is less than the unit cost of handling other traffic.* This completes the chain of evidence in this regard, for all other evidence in the case, dealing with the subject, was to the effect that the unit cost of hauling logs was considerably less than the average.

Having arrived at what he apparently considers to be a representative unit cost, he then goes to Associated Log Shippers Exhibit 3, (Fol. 196A-8, Trans. 87), and abstracts therefrom two items, the first being from line 12, showing the average revenue per thousand net ton miles from intra-state logs handled within the state, or $15.09, which is correct. He then takes line 11, which shows the revenue per thousand net ton miles of intra-state freight other than logs, or $22.42, and

uses it literally, without any comment whatever. Fortunately, sufficient comment is made in the text accompanying this exhibit, so that Mr. Turnburke's oversight may be corrected.

In compiling Associated Log Shippers Exhibit 3, an effort was made to get at the facts, and to provide the department with the information which it required to intelligently decide this case. It was known that the unit revenue from the log traffic was approximately 30 per cent in excess of the average unit revenue; and it was thought that a comparison of the unit revenue from log traffic, with the unit revenue from other intra-state traffic, and with the unit revenue from inter-state traffic would be of interest. Whereupon the carriers were called upon, through the department, to advise the Associated Log Shippers as to the relative number of intra-state ton miles, and inter-state ton miles handled within the State of Washington during the year 1920. These figures were furnished, but were never introduced by the carriers in any exhibit. They were so widely different from previous figures compiled by Mr. Calderhead as to result in comment by Mr. Gray that they might not be correct; and this is commented upon on pages 2 and 3

of the pamphlet containing the Associated Log Shippers revised exhibits. This possibility of error was brought out at the hearings, and at no time did the carriers see fit to discuss it, or to introduce any evidence on such point; or even to put in their own figures as exhibits. Mr. Gray expressed himself as extremely doubtful as to the correctness of the figures furnished by the carriers, and the figure of $22.42 arrived at by him was stated at the hearing to be of doubtful correctness, and no use whatever was made of it by the Associated Log Shippers. However, Mr. Turnburke apparently finds it of tremendous interest, for he drags it out without any qualifications whatever, and uses it in his exhibit to demonstrate the comparative profitableness of intra-state traffic other than logs, in contrast with the presumed unprofitableness of the log traffic.

Mr. Turnburge shows, for example, that during the year 1920, the log traffic incurred a deficit of $110,629; whereas the other intrastate freight earned a profit of $3,284,579. This is apparently an innocent and possibly convincing mathematical calculation, but carried to its logical end, the results are somewhat startling. For example, we have seen that during the year in question the total

operating revenue assigned to the state by Mr. Turnburke was $68,448,903. The corresponding operating expenses, exclusive of taxes, were $73,126,904, while the taxes, according to Mr. Turnburke, amounted to $8,787,926; making a deficit for the state, below the cost of operation and taxes, of $13,465,926. This, according to Mr. Turnburke's figures, would necessarily be divided as follows:

From Log Traffic.....	$ 110,629	Red
From other Intra-state Traffic	3,284,579	Black
From Interstate Traffic ...	17,241,385	Red
From Passenger and Miscellaneous Business	601,509	Black
	$13,465,926	Red

Is it not passing strange that the muchly despised local and short-haul freight (other than logs), should earn the substantial profit of $3,284,579, whereas the interstate shipments, the long haul business, presumably the cream of the freight traffic, which the traffic officials are perfectly frantic to get, and offer every possible legal inducement to procure, would yield the astonishing loss of $17,241,385? The answer is that it isn't so.

Now in fact, during the year 1920 the entire system of the four principal carriers

combined earned a net profit over operation of $28,547,523, of which $12,943,697 was earned from freight service (including switching, demurrage, etc.). But when we get to the State of Washington, we discover the somewhat astonishing fact that within that state during the same year, that while the four carriers combined incurred a calculated total loss over operation of $4,678,001, yet the calculated loss from freight service was even greater, or $6,992,550. The reason for this apparent condition is clearly that the State of Washington is not credited with its proper revenue, and is charged with an improper operating expense. The first error has no effect upon the comparison between profit from log traffic and other intra-state traffic as shown by Mr. Turnburke, but will tend to reduce the presumed loss from inter-state business. The second error, however, results in a net increase in operating expenses which has a tendency to clearly distort the whole situation. Now let us look as the matter in the following light, which is still decidedly in favor of the carriers.

THIS STATE PENALIZED

There is absolutely no reason why the unit cost of hauling freight within the state of Washington should be any greater than

the corresponding unit cost for the four systems as a whole. The carriers based their contention in this regard upon the topography of the country, and the decided interruptions in the terrain. The climatic conditions of Washington, and particularly Western Washington where logs move, are much more nearly ideal for transportation than those of the states of Montana, the Dakotas, and Minnesota, in which states the rigorous winters frequently cause the entire traffic movement to be suspended for weeks at a time, with an increase in expense, rather than a decrease.

During the year 1920, the gross ton miles handled upon the combined systems of the four principal carriers, as near as can be determined, was 67,621,752,398, the cost of freight operation being $304,519,938, or at the rate of approximately $4.51 per thousand gross ton miles. This cost, applied to the gross ton miles of all freight moved within the state during the year 1920, or 8,589,577,-958 gives a total cost for freight operation within the state during the year, of $38,738,-997, or $13,569,271 less than the operating cost charged to the state of Washington by the carriers. This is a reduction of 26 per cent.

As it is probable that due to trainload movements, the unit cost of hauling logs should be at least 20 per cent less than the unit cost of handling other freight, it seems fair to consider that the previously calculated total cost of hauling logs within the state during 1920, or $2,538,467 is approximately 31.2 per cent in excess of what it should be; or in other words, that the proper operating cost to be assigned to the log traffic within the state during the year 1920, including the proper portion of the cost of hauling non-revenue freight, would be $1,746,465, instead of $2,538,467. To this proper cost should be added the item of taxes.

Twenty-five per cent of the total calculated tax would be ample to apply to the log traffic; consequently the proper charge to be assessed against such traffic is taken as 2.55 per cent of the gross revenue therefrom. This revenue is shown by all exhibits to have been $2,859,172; but that is merely the revenue from the transportation of logs, and takes no account whatever of the system non-operating net income of $846,402, or the incidental freight revenue assigned to the state of Washington, or $1,418,472. For lack of more definite information, the non-operating income will not be considered here, but cer-

tainly a portion of the incidental freight revenue accruing from the log traffic, particularly that covering demurrage charges, which aggregated $281,158, should be credited to the log traffic. These demurrage charges may logically be apportioned upon the basis of the number of loaded cars handled, of which log cars constituted approximately 20 per cent; so that certainly additional revenue to the amount of $56,232 can be assigned to the log traffic, making a total revenue from such traffic of $2,915,404.

Upon this basis the taxes assignable to log traffic of the state of Washington would be $74,343, making a total cost of operation assignable to the log traffic of $1,820,808, as compared with a minimum revenue of $2,915,404, showing a minimum net revenue over and above the cost of operation, taxes, and depreciation of equipment of $1,094,596, as compared with a calculated loss shown by Mr. Turnburke of $110,629.

Mr. Turnburke, in Exhibit No. 24, (Vol. 2, Fol. 397, p. 305), several times calls attention to the fact that the costs shown do not include uncollectable accounts, or rents of equipment and facilities. This is apparently correct. These items are carried on the income account, rather than in the operating

expenses. The total uncollectable accounts for the entire system, during 190, was $94,-793, or $0.00015 per thousand gross ton miles. By the time we get down to logs, the correction will be too small to notice. While the rent of equipment and facilities, instead of being a net expense, actually yielded a net combined system profit of $846,402, some of which might accrue to the log traffic.

MINIMUM LOAD

Findings Nos. 23, 24 and 25 trans. pp. 28-29) have to do with log bunks and minimum loading.

One of the reasons for fixing a minimum load is to encourage the use of equipment to its capacity. It was testified by the witness Frost (Supl. trans. page 81, fol. 1087) and by the witness Doherty (Supl. trans. page 876, fol. 986) that a car equipped with steel log bunks could be loaded with from five to seven hundred feet more than could a car not so equipped. The witness Frost (Supl. trans. page 81, fol. 1087) testified that a very considerable portion of the timber could not be loaded to the minimum of seven thousand feet required while the larger logs could be loaded beyond that minimum. He also testified that this resulted in much of the timber being left in the woods.

The smaller timber which brings the cheaper price is therefore charged the higher rate under the seven thousand foot minimum per car. With the cheaper logs taking the higher rate the logger is unable to market his product. The more valuable commodity takes the lower rate and the cheap commodity takes the high rate. By the order of the Department there can be no such discrimination as might be present in the ordinary train load rate. The order of the Department provides that if one shipper ships one car of logs the minimum will be seven thousand feet per car if the car is equipped with patent bunks and six thousand five hundred feet if not so equipped, so that whether a man ships one car or thirty cars the carrier is paid for the ordinary capacity of its car.

Conservation of the timber resources is a national problem and the method adopted by the Department to make it possible to market much of the timber which is now necessarily wasted will result in increased tonnage for the carrier and will have a marked influence on the conservation of timber resources. At the same time it will provide a rate for the carrier based upon at least seven thousand feet or six thousand five hundred feet for each and every car depending upon the char-

acter of the equipment. The carrier will be paid its regular tariff per one thousand feet for every foot of timber it hauls and will not be collecting for timber which it does not haul. By the methods heretofore adopted by the carriers the shipper was compelled to pay the rate based upon the minimum load for a car when it was impossible for the shipper to load to such a minimum because of the lack of capacity of the car.

While there have been some cases condemning train-load rates because such rates give the large shipper an advantage over a small competitor we find nothing in such cases condemning a rule or rate such as prescribed by the Department in this case where the small shipper is given the same rate per car as the larger shipper. No discrimination can result from the rule promulgated by the Department.

CONCLUSION

We are advised that the Attorney-General will file a brief discussing the several findings of the Department and the assignments of error proposed by the carriers.

We have not attempted to discuss all of the statements made by the carriers in the several briefs but have attempted to show that

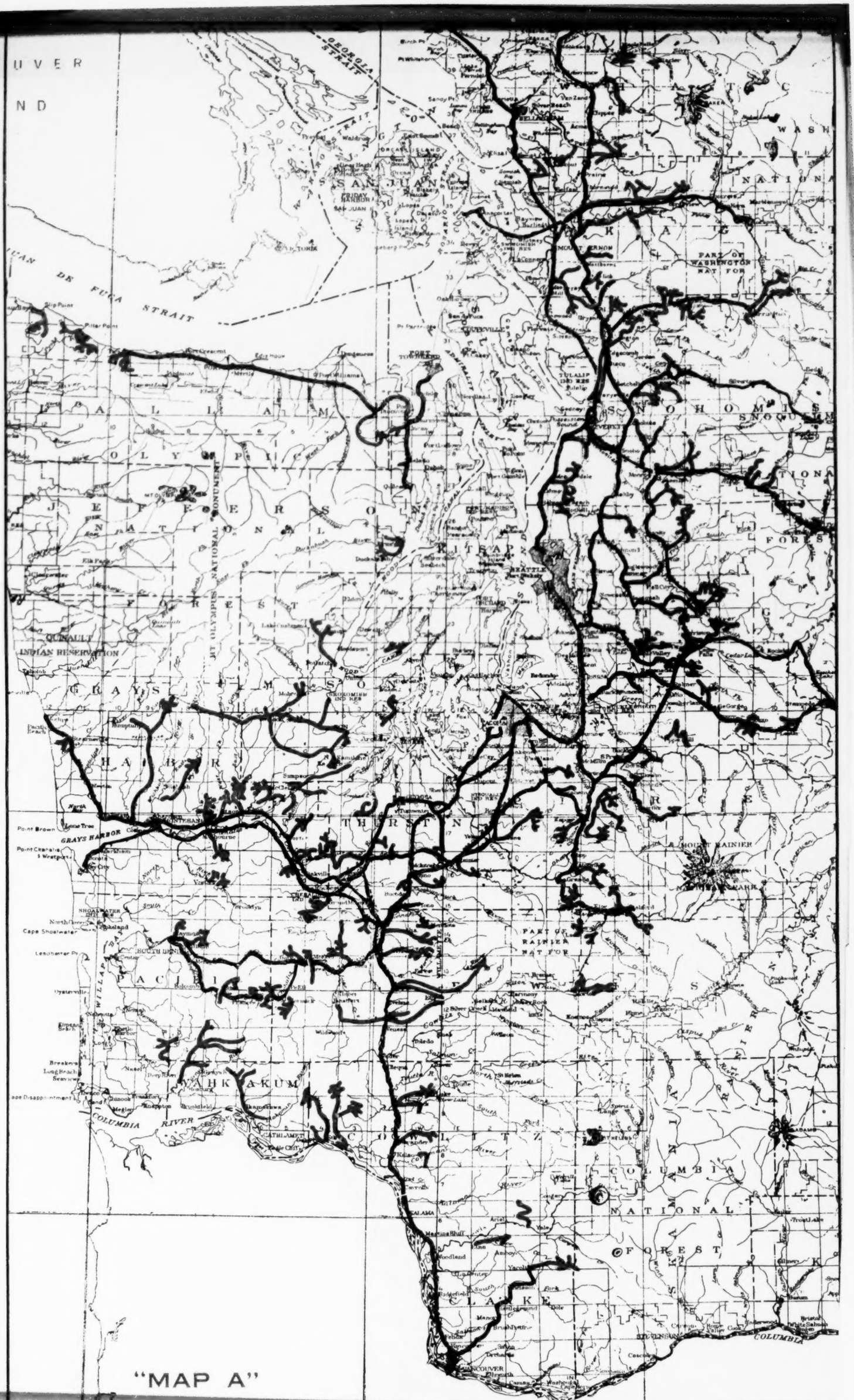
the Department of Public Works was thoroughly justified in its comparisons for the purpose of demonstrating that the cost of hauling the log traffic was no greater than the cost of hauling the average traffic. We think we have at least shown that the carriers have not demonstrated that the cost of hauling logs is greater than the cost of hauling the average traffic. Until such a demonstration is made the order of the Department should be sustained.

If the cost of hauling logs is not considerably above the average cost for other freight each of the carriers is making a profit from the hauling of logs and will continue to do so under the rates prescribed by the Department. This being true, no confiscation can result.

The order of the Department was made after a full and fair hearing; this order was sustained by the Superior Court of the State of Washington and by the Supreme Court of the State of Washington and it would therefore seem, that until positive demonstration has been made by the carriers that the rates prescribed by the department of

Public Works are confiscatory, this Court will not attempt to substitute its judgment for that of the administrative body or the inferior courts.

SCOTT Z. HENDERSON,
Attorney for Defendants in Error.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FOREST
OLYMPIC NATIONAL MONUMENT
QUINAULT INDIAN RESERVATION
GRAYS HARBOR
MASON
PACIFIC
LEWIS
THURSTON
PIERCE
GRAYS HARBOR
Point Brown
Point Chehalis
Cape Shoalwater
North Cove
Oysterville
Breakers
Long Beach
Seaview
Cape Disappointment
WAHKIAKUM
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SKAMANIA
CLARK
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Woodland
Amboy
Yacolt
Battle Ground
Hockinson
Brush Prairie
Camas
Washougal
Vancouver
Elwood
Cosmopolis
Aberdeen
Hoquiam
Montesano
Elma
Olympia
Shelton
Kelso
Longview
Castle Rock
Kalama
Woodland
Ridgefield
Stevenson
Bingen
White Salmon
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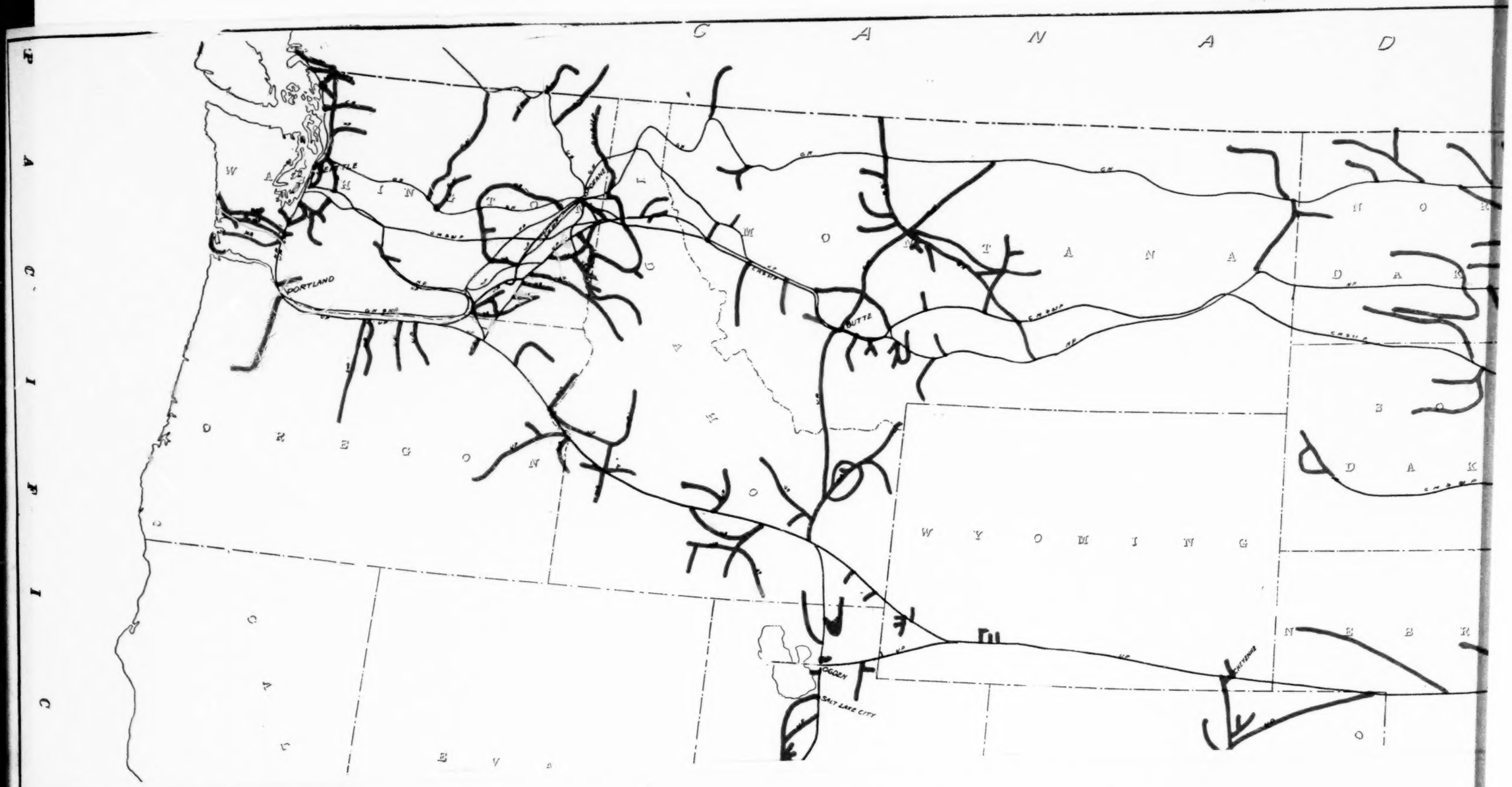
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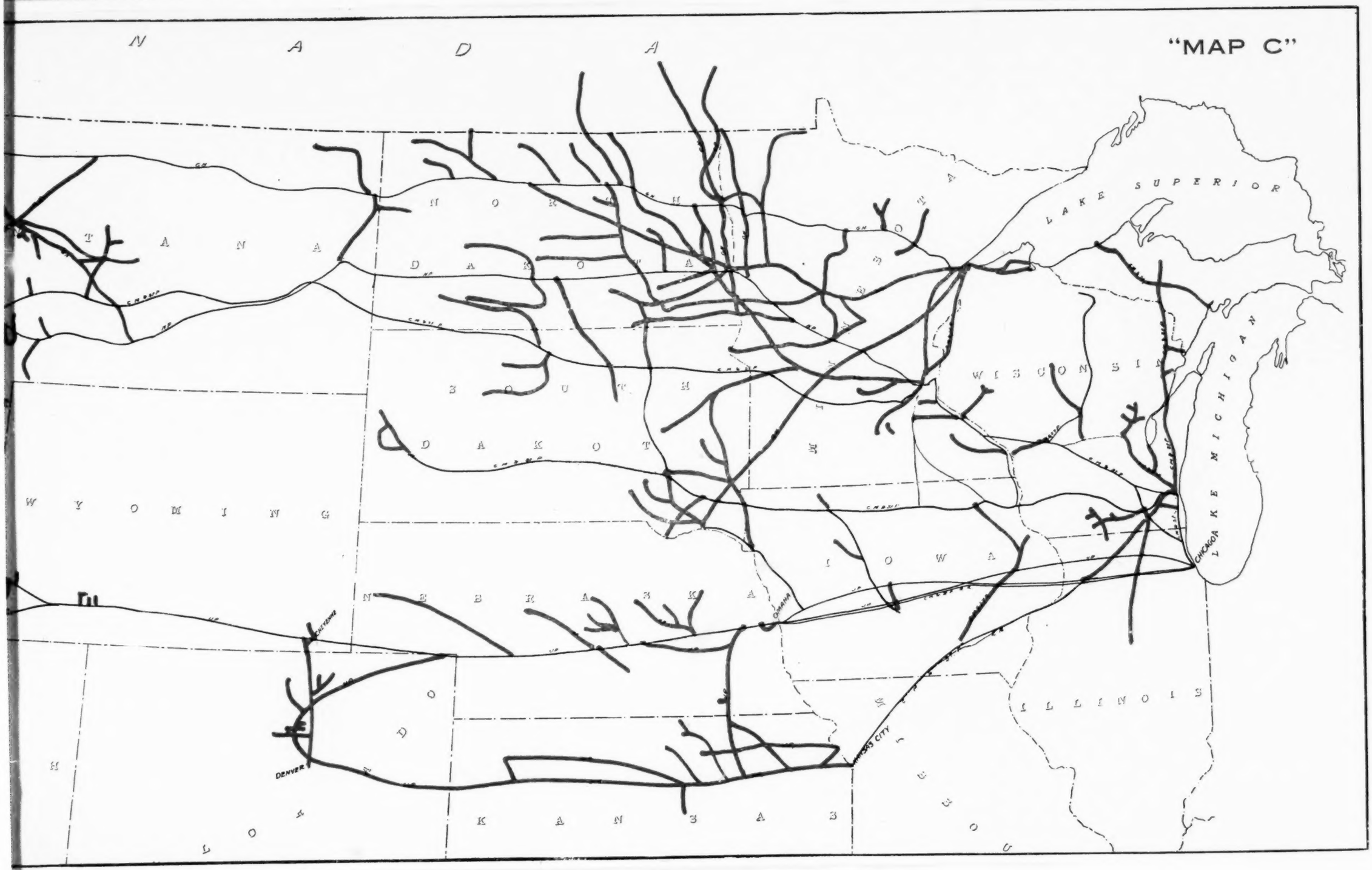
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WISCONSIN
MINNESOTA
CHICAGO
OMAHA
DENVER
CHEYENNE
KANSAS CITY

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IN THE

SUPREME COURT

OF THE

UNITED STATES

No. 371.

OCTOBER TERM, 1924.

NORTHERN PACIFIC RAILWAY CO., *et al.*, *Plaintiffs in Error*,
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THE DEPARTMENT OF PUBLIC WORKS OF WASHINGTON, *et al.*, *Defendants in Error*.

Brief and Argument of Defendants in Error

JOHN H. DUNBAR,
Attorney General of the State of Washington.

RAYMOND W. CLIFFORD,
STEPHEN V. CARNEY,
Attorneys for Defendants in Error.

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STATEMENT.

This case involves the efforts of the Public Service Commission of Washington, and its successor the Department of Public Works of that state, to remove the great number of unlawful discriminations existing in the rail rates for the transportation of sawlogs within the State of Washington. These rates have long been in a chaotic condition. The rate situation

existing at the commencement of this proceeding, and which still continues, is graphically represented by a series of diagrams copied from Department's Exhibit "A" (Record p. 73), reprinted herein and attached hereto as Appendices "A," "B," "C," "D" and "E." Through inadvertence, the Clerk of the Supreme Court of the State of Washington failed to send to this court the diagrams referred to at the time the record was made up, although the same were included in the designation of plaintiffs in error. These omissions have now been supplied and will be found in the record in this court.

The defendants in error first called upon the railroads themselves to voluntarily correct these admittedly unlawful rates, and acted only after the carriers had neglected to take any steps whatever in that direction. The defendants in error, in the exercise of admitted authority under the state law, instituted a proceeding to remove the many discriminations. The complaint (Record pp. 2, 3) of the regulatory body, after the usual descriptive and jurisdictional recitals, and a specific reference to all the tariffs involved, contains the following:

"That all of the tariffs referred to in the preceding paragraphs contain rates and charges, rules and regulations for the transportation of logs within the State of Washington, which rates and charges, rules and regulations are excessive, unreasonable, discriminatory and preferential. That the Commission, in its findings in Cause No. 5092, dated at its office in Olympia, Washington, August 17, 1920, specifically called the attention of the above named

carriers to the discriminatory character of the rates and charges set out in the various tariffs covering the movement of logs within the State of Washington, and in said Cause No. 5092 requested that carriers within a reasonable time file new tariffs in lieu of the ones then in effect, and referred to above by number of previous issues thereof, containing new rates and charges that would be reasonable and non-discriminatory. That a reasonable time has elapsed, and each and all of said carriers above referred to have failed to file such tariffs."

The carriers joined issue upon these allegations by general denials of the same. Upon hearing, however, the carriers abandoned this position. Their witnesses admitted the existing inequities and offered an historical explanation of the same. Aside from a few minor corrections in distances, Department's Exhibits "A," "C" and "D" (Record p. 73 *et seq.*) were referred to and accepted by the parties as a true compilation by tables and graphs of the existing log rates and the movement under the same.

The Oregon-Washington Railroad & Navigation Company alleged in its answer that the existing "rates, charges, rules and regulations are fair, just and reasonable." (Record p. 12.) The answer of the Great Northern Railway Company was to the same effect. (Record p. 10.) These carriers later joined with the others in urging that Tariff 29, providing a substantial increase in rates, be made effective.

The proceeding before defendants in error resolved itself into one where the effort was to discover

a reasonable, non-discriminatory tariff, and the proposals in this connection are a part of the record, and will be hereinafter pointed out. The course of this matter is more fully indicated by the portion of the findings and order under the caption "History" (Record p. 19), and Finding II (Record p. 20); as to these, no error has been assigned at any time. The portions referred to read as follows:

"HISTORY.

"This cause involves the rates, rules, regulations and charges applicable to the intrastate movement of logs within the State of Washington, and is brought about by complaint on its own behalf by the Public Service Commission of Washington, now the Department of Public Works of Washington and hereinafter referred to as the Department.

"Briefly reviewed the present log rates now under consideration originated through the establishment by the Northern Pacific Railway Company of log rates for the use of tidewater lumber mills to whom had been sold large tracts of standing timber acquired by the Northern Pacific Railway Company in the Government land grant. The contract under which the timber was purchased provided that a heavy percentage of the manufactured product of logs should be moved over the line of the Northern Pacific Railway to transcontinental points, and a rate was named for the transportation of the logs from the point of logging operations to the lumber mill which was in the nature of a milling in transit rate. All subsequent log rates have been more or less governed by the established log rates published by the carriers in the early days for the purpose of securing the establishment of lumber mills at advantageous localities from an operating standpoint. The tariffs of the carriers, both past and present, confirm this belief in

their definition of sawlogs prescribed in their tariffs as follows:

" 'The term "sawlog" as used in this tariff, applies only to cedar, cottonwood, fir, hemlock, larch, pine, poplar or spruce logs manufactured at saw mills into lumber or shingles.'

"In no other tariffs except those providing for milling in transit privileges is an analagous definition of any commodity carried."

"II.

"The rates on logs as covered by this cause were originally those named by the carriers themselves, and with a few exceptions the Public Service Commission of Washington has not considered any of the log rates named by the carriers in any case before it. There has never been a case involving all of the rates applicable to the movement of logs within the state before this Department. It is worthy of note that practically all log rates were voluntarily established and maintained for long periods by the carriers themselves without application to any regulatory body for any increase, prior to Federal control. While the carriers were under the control of the United States Railroad Administration, all rates for the transportation of freight were increased 25 per cent effective June 25, 1918, under General Order No. 28 of the United States Railroad Administration, and on August 26, 1920, these rates were again increased 25 per cent by order of the Interstate Commerce Commission in Ex Parte 74 and of the Public Service Commission of Washington in Cause No. 5092."

The judgment sought to be reviewed involves the rate-making order of a state administrative tribunal, affirmed by the Superior and Supreme Courts of that state. The administrative body derives its powers and duties from the Public Service Commission Law of Washington (Remington's Compiled Statutes of

Washington, 1922, Sec. 10,339 *et seq.*). This is a complete act upon the subject. It provides that all charges made by any common carrier shall be just, fair, reasonable and sufficient (Sec. 10,345), that is not too high to the prejudice of the shippers and not too low to the prejudice of the carrier. The tribunal created by the act is given power to correct abuses, but this power is to be exercised only when its jurisdiction is invoked by a written complaint and after notice and hearing (Secs. 10,389 and 10,422). The carrier against whom complaint is made is guaranteed a full and complete hearing and a compulsory process for the attendance of witnesses. At the conclusion of the hearing, the regulatory body is required to make findings of fact and a written order which must be served on the carrier before it becomes subject to any penalties (Sec. 10,423). If the carrier is dissatisfied with the order, provision is made for a complete judicial review in the Superior Court. This review is had upon the evidence and exhibits introduced before the regulatory body and certified by it to the Superior Court—a court of general jurisdiction in the State of Washington (Sec. 10,428). If the carrier can make a sufficient showing, it is entitled to have the order superseded pending the review proceeding in the Superior Court (Sec. 10,429). If the decision of the Superior Court is adverse, the carrier may appeal to the Supreme Court of the state and likewise in that court have a complete judicial review, and pending the determination of such appeal, it may

have the order suspended if a proper showing be made (Sec. 10,430).

Since the decision of "Railroad Commission Cases," 116 U. S. 307, it has not been open to question that the several states have the right to regulate the intrastate rates of common carriers and may do so through an administrative department or commission, provided the scheme of regulation accords to carriers a full and fair opportunity to be heard before the administrative body and does not deprive them of their right to a judicial determination of judicial questions. The plan of regulation prescribed by the Washington statute, namely, a full hearing before the administrative body on complaint and after notice, with a judicial review in the Superior Court and on appeal in the Supreme Court on the record made before the administrative body, was expressly approved by the Supreme Court of the United States in *State ex rel. O. R. & N. Co. v. Fairchild et al.*, 224 U. S. 510. From the foregoing, it is clear beyond any question that this writ of error does not challenge the validity of state law nor the authority which the state legislature by passing the law conferred upon the defendants in error. From one of the briefs of plaintiffs in error (Chicago, Milwaukee and St. Paul Railway Company p. 71) just received it appears that the validity of state law and of the authority of the defendants in error to proceed under that law is conceded. The language of this brief is as follows:

"That the Washington Public Service Commission Act properly construed and applied, would provide the due process of law required by the Fourteenth Amendment to the federal constitution is not here questioned."

We have not attempted to discuss the issues in the same order adopted by plaintiffs in error. Their briefs were served upon us at a late date (February 6, 1925), and this brief was necessarily prepared in large part before that time.

ARGUMENT.

I.

The Existing Log Rates Are Admittedly Discriminatory.

The Department's Finding IV (Record p. 22) is unchallenged. It reads as follows:

"The rates for the transportation of logs within the State of Washington now charged by the four principal carriers within the state, as well as the rates for the transportation of logs charged by such carriers prior to August 26, 1920, are and were those shown by Department's Exhibit 'A'."

Exhibit "A" (Record p. 73) clearly shows the discriminations in the existing rates. It was used by carrier witnesses to illustrate their testimony, was uncontroverted, and no exhibit comparable in any respect was offered by the carriers. Finding XXVII (Record p. 29) is unchallenged. It reads as follows:

"The testimony disclosed that the carriers, parties hereto, had heretofore entered into certain contracts naming log rates and we will direct that the carriers, parties hereto, terminate any and all such contracts insofar as they may name rates, rules, regulations or charges, differing from those herein prescribed."

The traffic movement under these discriminatory rates, both tariff and contract, is shown on Department's Exhibit "C" (Record p. 73, fol. 194-1). The witness Mount discussed at some length (Record p. 455 *et seq.*) the basis of the present log rates within

the state, and further testified as follows (Record p. 458, fol. 245):

"We realize that there are a number of inconsistencies in our present rate structure in that we haul one man's logs, for instance, 10 miles charge him as high or higher rate than we will another man for 15 or 20 miles. There are a number of these instances and a great many of them were made under special conditions, but, as a whole, looking at the situation generally, it is my opinion that a distance scale of rates should be established in this territory which will afford shippers the benefit and advantages of their location."

The witness Capron had his attention directed to Department's Exhibit A by counsel for the carriers and testified as follows (Record p. 482, fol. 286):

"Yes, the general inconsistency of the rates for equal distance that is shown by this exhibit results from the manner in which the log rates were originally made, the conditions that control the making of those rates in the early days."

The witness, continuing, explained that many of their rates involved considerations that would be improper under present regulatory laws. Upon having his attention directed to certain rates he testified (Record p. 483, fol. 288): "We have lots of rates that are higher for equal distances."

The need for removal of existing inequities in log rates was specifically brought to the attention of the carriers by the state regulatory body in its order in Cause 5092 (Record p. 4) which order dealt intrastate with the increases allowed by the Interstate

Commerce Commission in Ex Parte 74. A portion of the order in Cause 5092 reads as follows (Record p. 7):

"With particular reference to the objections urged upon the part of the logging industry, it is our opinion that the present rates are illogically constructed and not in harmony in different communities, and that unless carriers immediately proceed to arrange a modification of such rates, the Commission will, upon its own motion, require a readjustment of same, but for the reasons above stated, will permit the percentage increase authorized by the Interstate Commerce Commission to apply upon the log rates in this state."

The exaggerated inequalities produced by application of a percentage to rates already lacking in uniformity were indicated in the same findings as follows (Record p. 8, fol. 8):

"This Commission while granting the percentage increase for the reasons stated herein, is of the opinion that increase in revenue desired by the carriers should ordinarily be made upon some other basis than that of percentage. While any increase in rates will produce a percentage of the former rate, the fixing of increases by percentage works injustice to communities and commodities, and as a general rule should not be applied where increase in revenue is desired, and this Commission will in the future, as in the past, oppose advances in freight rates by the Interstate Commerce Commission or by carriers, by the percentage method. We consent to this method in this instance solely upon the ground of the existing emergency and the lack of time for the application of a more scientific basis." (p. 9) "We shall expect the carriers as rapidly as possible to make such modifications of their tariffs as will remove the objection-

able features which must inevitably result from any percentage increase."

Nothing was done by the carriers to remove discriminations and place the log rates upon a lawful basis. The defendants in error were finally compelled to themselves initiate the proceeding, and enforce the state law. The Constitution of the State of Washington provides in Article XII, Section 15 (Remington's Compiled Statutes, 1922, p. 110) as follows:

"No discrimination in charges or facilities for transportation shall be made by any railroad or other transportation company between places or persons, or in the facilities for the transportation of the same classes of freight or passengers within this state, or coming from or going to any other state."

The Public Service Commission Law of Washington provides as follows (Rem. Comp. Stat. 1922, p. 2816):

"Section 10356—No common carrier shall, directly or indirectly, by any special rate, rebate, drawback, or other device or method, charge, demand, collect or receive from any person or corporation a greater or less compensation for any service rendered or to be rendered in the transportation of persons or property, except as authorized in this act, than it charges, demands, collects or receives from any person or corporation for doing a like and contemporaneous service in the transportation of a like kind of traffic, under the same or substantially similar circumstances and conditions."

"Section 10357—No common carrier shall make or give any undue or unreasonable preference or advantage to any person or corporation or to any local-

ity, or to any particular description of traffic in any respect whatsoever, or subject any particular person or corporation or locality or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

II.

The Burden of Proof Was Properly Placed Under State Law.

The first assignment of error reads as follows:

"The Supreme Court of Washington erred in holding and deciding that the burden of proof was on plaintiffs in error to show that the rates and charges applicable to the transportation of logs were not unjust, unreasonable and unjustly discriminatory, and in affirming the order of the Department of Public Works so placing the burden of proof upon the plaintiffs in error, and thereby the property of plaintiffs in error and each of them was taken without due process of law, and they are and each of them is deprived of the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States."

The portion of the decision of the Supreme Court of Washington attacked by this assignment, reads as follows (Record p. 53):

"It is first contended that the court erred in holding that the carriers had the burden of proof. The record shows that there was sufficient evidence introduced to make a *prima facie* showing that the rates were discriminating and unlawful, and the carriers were properly required to sustain the burden in support of their new proposed tariff No. 29, under Section 10424, Rem. Comp. Stat. (P. C. Section 5609), which provides as follows: 'At any hearing involving any change in any schedule, classification,

rule or regulation the effect of which is to increase any rate, fare, charge, rental or toll theretofore charged, the burden of proof to show that the changed schedule, classification, rule or regulation, or the increased or proposed increased rate, fare, charge, rental or toll is just and reasonable shall be upon the public service service company.' "

The assignment clearly involves a question of state law. The construction put upon the statute quoted, by the highest court of the state, is binding upon this court.

Munday v. Wisconsin Trust Co., 252 U. S. 499;
Farncomb v. Denver, 252 U. S. 7;
Wells, Fargo & Co. v. Nevada, 248 U. S. 165, 167;
Municipal Securities Corp. v. Kansas City, 246 U. S. 63, 69;
St. Louis Land Co. v. Kansas City, 241 U. S. 419, 427.

The applicable law having been clearly declared by the state court, and its construction being a matter which will be accepted here as made, the ultimate question is one of sufficiency of procedure. In determining whether proceedings under state law afford due process, this court will look to substance and not form. The Fourteenth Amendment does not control mere forms of procedure in state courts, nor regulate the practice therein, but requires that the substance of due process be afforded.

First National Bank v. Missouri, 263 U. S. 640, 641;
Galleys v. Schmidt, 183 U. S. 300, 307;

Simon v. Craft, 182 U. S. 427, 437;
Louisville & Nashville R. R. Co. v. Schmidt, 177 U. S. 230, 236;
Winona & St. Peter Land Co. v. Minnesota, 159 U. S. 526, 537.

As pointed out in our brief on motion to dismiss, it has never been contended in this case, nor could it be, that the law of Washington as construed by the courts of the state, does not provide complete and adequate due process. The plan of regulation prescribed by the Washington statute, namely a full hearing before the administrative body on complaint and after notice with a judicial review of both law and fact in the Superior Court and on appeal in the Supreme Court on the record made before the administrative body, was expressly approved by the Supreme Court of the United States in *State ex rel. O. R. & N. Co. v. Fairchild et al.,* 224 U. S. 510.

The second assignment is as follows:

"The Supreme Court of the State of Washington erred in refusing to reverse and set aside the order of the Department of Public Works of said state, for the reason that said order placed upon the plaintiffs in error the burden of proof to show that the rates and charges applicable to the transportation of logs were not unjust, unreasonable, and unjustly discriminatory, thereby causing an undue and unreasonable advantage, preference and prejudice as between persons and localities in intrastate commerce on the one hand and interstate commerce on the other hand, and undue, unreasonable and unjust discrimination against interstate commerce, contrary to the commerce clause of the Constitution of the United States

and contrary to Section 13 of the Interstate Commerce Act as amended by the Transportation Act of 1920."

The State Supreme Court, interpreting the Public Service Commission Law of Washington, held that the burden of proof herein had been properly placed. The validity of that law in the constitutional sense is now admitted (Brief of Chicago, Milwaukee & St. Paul Railway Company, p. 71). The issue raised by the assignment is accordingly narrowed to the right of a state to regulate its internal commerce, by means of a procedure admittedly lawful. Of such right, we conceive there can be no doubt. It follows that such lawful procedure, assuming but not admitting that it differ from the procedure affecting interstate commerce, does not result in any unlawful preference of intrastate commerce or prejudice of interstate commerce, nor an unlawful discrimination against interstate commerce.

III.

The Department's Order Removes an Existing Discrimination.

The third assignment is as follows:

"The Supreme Court of the State of Washington erred in affirming the order of the Department of Public Works, for the reason that in and by said order the Department cancelled the schedule of advanced rates applicable to the transportation of logs prescribed by the Interstate Commerce Commission in its decision in Ex Parte 74, 58 I. C. C., page 220, and thereby caused an unjust and unlawful discrim-

ination against interstate commerce and a corresponding preference and advantage to intrastate commerce, in violation of the commerce clause of the Constitution of the United States and of Section 13 of the amended act to regulate interstate commerce, and deprives plaintiffs in error and each of them of a fair return on the value of their property awarded by the Interstate Commerce Commission pursuant to the provisions of Section 15-A of said amended act to regulate commerce."

The assertion of the assignment that the regulatory order "cancelled the schedule of advanced rates applicable to the transportation of logs prescribed by the Interstate Commerce Commission in its decision in Ex Parte 74" is contrary to the record and the facts. Conversely, if the rates ordered by the Department now become effective, there will be eliminated thereby an existing discrimination preferring interstate commerce and prejudicing intrastate commerce. A brief resume of rate orders state and interstate will demonstrate the discrimination which exists and will continue until the rates ordered become effective.

While the carriers were under the control of the United States Railroad Administration, the rates here involved, as well as all intrastate and interstate freight rates in this territory, were increased 25 per cent effective June 25, 1918, under General Order No. 28 of the United States Railroad Administration (Record p. 20). On August 26, 1920, both intrastate and interstate freight rates in this territory, and including the rates here in issue, were again increased

25 per cent by order of the Interstate Commerce Commission in Ex Parte 74 (58 I. C. C. 220) and of the Public Service Commission of Washington in Cause No. 5092 (Record p. 4). These rates had then borne two successive increases of 25 per cent, or a total cumulative increase of 56¼ per cent.

In 1921 and the early part of 1922, the Interstate Commerce Commission was engaged in a comprehensive investigation to determine whether a general reduction in freight rates should be ordered, and announced its decision therein May 16, 1922, "In the Matter of Rates, Fares and Charges of Carriers Subject to the Interstate Commerce Act" No. 13,293—68 I. C. C. 676 (Reduced Rates, 1922). In the language of the report of the Commission (p. 678):

"This proceeding was instituted upon our own motion for the purpose of determining whether, and to what extent, if any, further general reductions in rates, fares and charges of carriers by railroad applicable in interstate or foreign commerce may lawfully be required under section 1 or other provisions of the interstate commerce act upon any commodities or descriptions of traffic; and also to determine what will constitute a fair return on and after March 1, 1922, under section 15a (3) of the interstate commerce act."

Carriers were requested to develop by their evidence, *inter alia,* (p. 679) "to what extent since August, 1920, * * * (b) operating expenses have been reduced; (c) the cost of fuel to carriers has declined," and their proof embraced these matters. Five and three-fourths per cent of the aggre-

gate value of the railway property of carriers was determined by the Commission as constituting a fair return thereon on and after March 1, 1922, superseding the finding and order of six per cent as a fair return in "Increased Rates 1920," 58 I. C. C. 220. In the instant case, defendants in error entered their order with a view to the allowance of six per cent (Finding XX—Record p. 27). The Interstate Commerce Commission notices (p. 698) a decrease of 20 per cent in prices of material and supplies as estimated by the carriers upon the basis of charge-out index prices, and intimates the decrease might be 25 per cent, if purchase price indices were used. Reductions in labor costs and expenditures for fuel are dealt with on pages 695 and 696 of the report. Concluding, the commission says (p. 731):

"When we decided Increased Rates, 1920, supra, the country was still in a period of steadily rising prices. We then resolved doubts as to further operating costs in favor of the carriers. In recent months costs have been declining and traffic increasing. Rates of pay for employees have been reduced to an extent which, based upon the light traffic of 1921, is estimated by carriers to aggregate more than $350,000,000 per annum. The Railroad Labor Board has estimated that the reduction exceeds $400,000,000 per annum without taking into account changes in rules and working conditions. The tendency is toward increased revenues, lowered costs, and higher net income for the carriers."

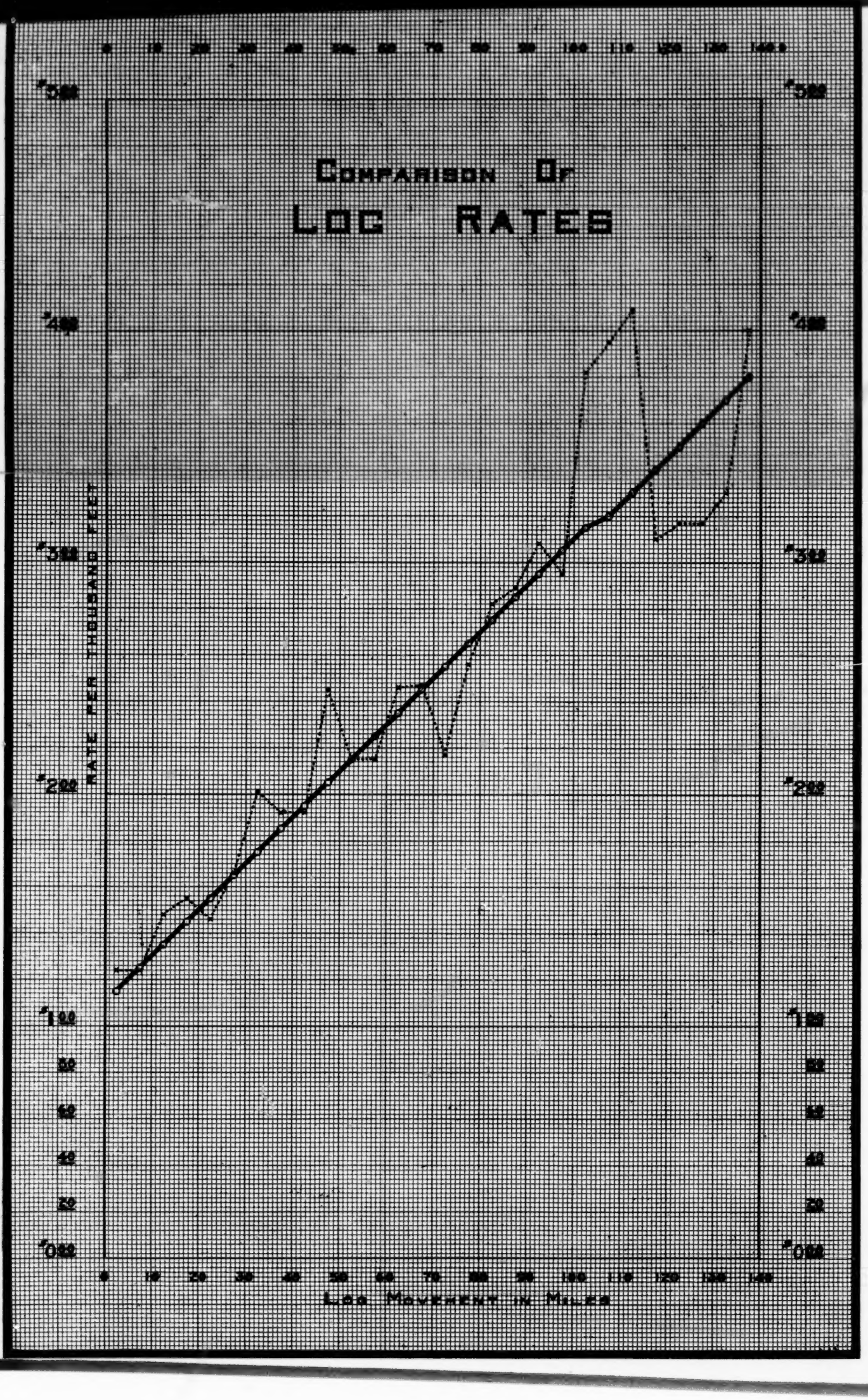
Interstate rates in this territory were accordingly decreased to the extent of one-half of the increase allowed in Ex Parte 74, 58 I. C. C. 220.

Simultaneously with the investigation of the Interstate Commerce Commission which culminated in "Reduced Rates, 1922" *supra,* the defendants in error were engaged in 1921 and the early part of 1922 in a comprehensive investigation of rates charged for the transportation of logs within the State of Washington, the order in which proceeding gave rise to the case at bar. With respect to operating expenses, a reduction of approximately 20 per cent is noted (Finding VII—Record p. 22), which is substantially the finding of the Interstate Commerce Commission touching the same facts (68 I. C. C. 695, 696, 698). The regulatory order in the instant case issued February 1, 1922. The Interstate Commerce Commission made the fair return determined by it in "Reduced Rates, 1922" effective March 1, 1922. Had the instant court case not been originated, the log rates involved would some time ago have been reduced in accord with "Reduced Rates, 1922," as were all other rates state and interstate in this territory.

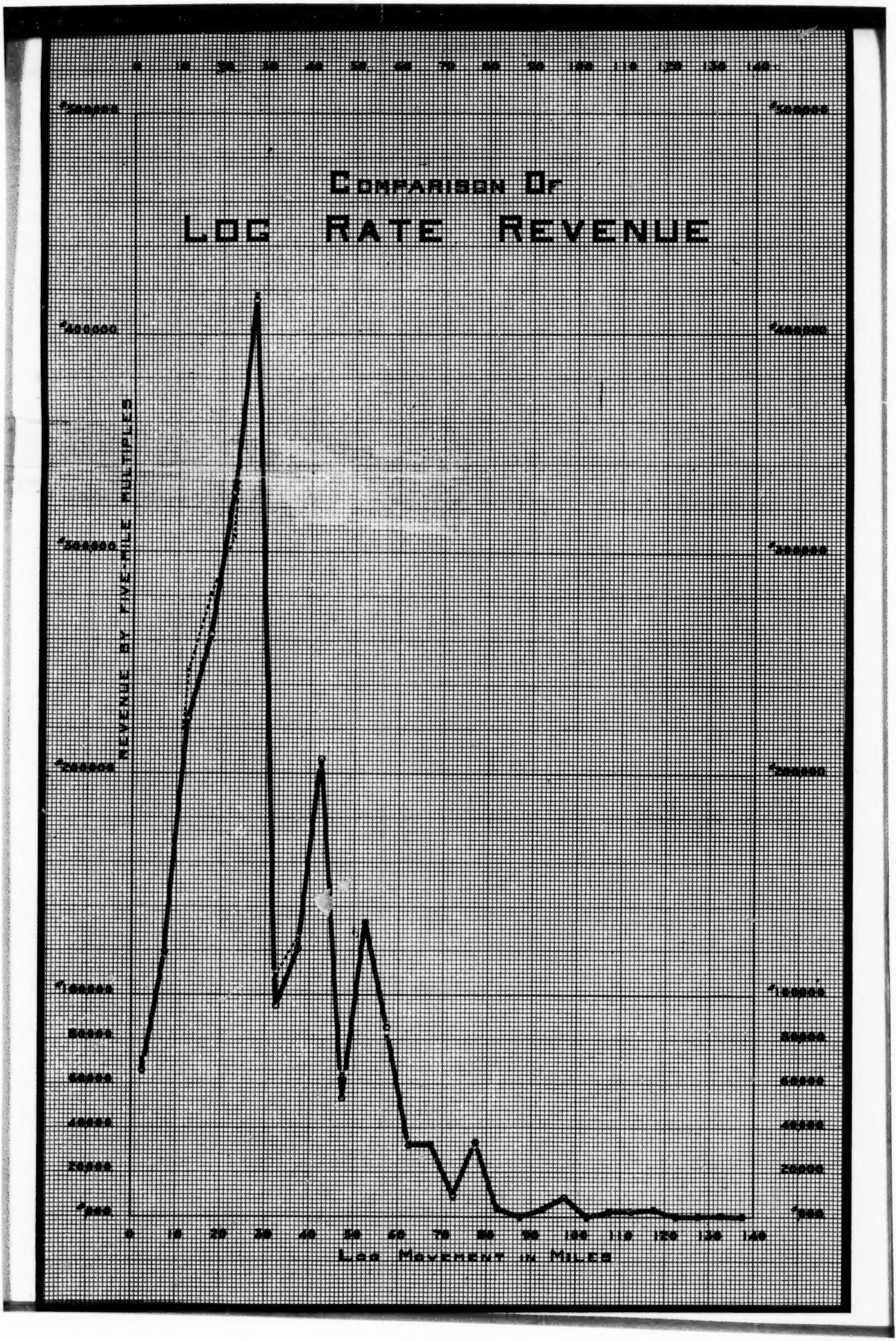
The Interstate Commerce Commission in deciding "Reduced Rates, 1922" and the defendants in error in deciding the instant case, were, so far as level of rates and rate reduction were concerned, applying substantially the same facts. We therefore have a right to expect a similarity in the amount of reduction ordered in each case. Let us compare the scale of log rates ordered by the Department with a scale constructed by taking the existing log rates and re-

ducing them in accordance with "Reduced Rates, 1922." Such a comparison is graphically shown by the three charts which follow. In these three graphs, compiled entirely from figures contained in Department's Exhibits "A" (Record p. 73) and "C" (Record p. 73 fol. 194-1), a comparison is made of (a) the log rates now being charged by the carriers (all paper rates eliminated) reduced by the amount of the decrease ordered by the Interstate Commerce Commission in "Reduced Rates, 1922," and (b) the scale of rates ordered by the Department.

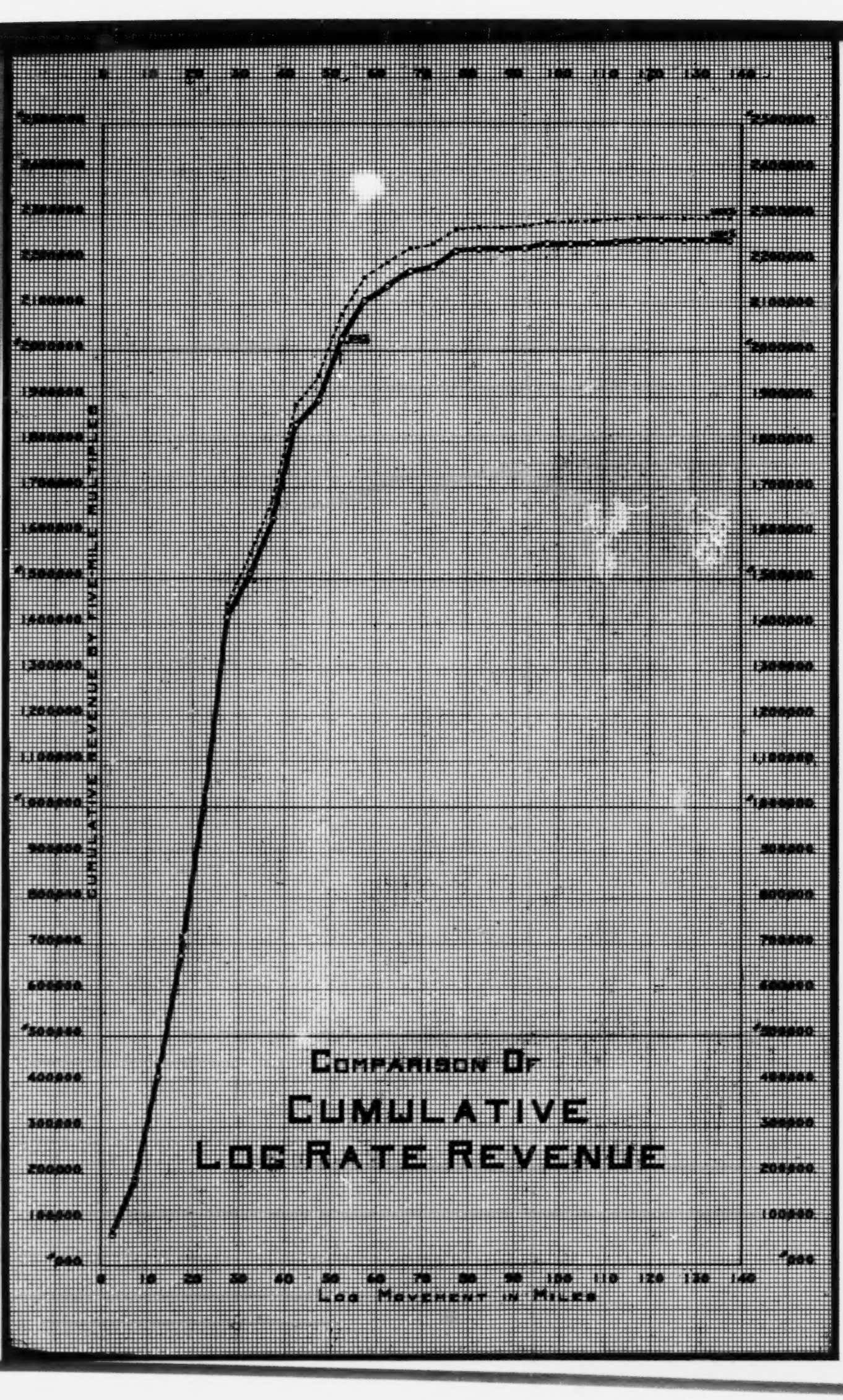
The first graph is a straight rate comparison. (a) The existing log rates reduced by the same amount as ordered in "Reduced Rates, 1922" are shown thus - - - - - x - - - - - x - - - - - (b) The rates rates ordered by the Department are shown thus ——o———o———o———o The distance to which the rate applies is shown on the horizontal scale and the amount of the rate in dollars is shown on the vertical scale. It will be seen that the general trend of the rates is remarkably similar for all ordinary distances; the wide divergence comes in the longest hauls where the smallest amount of the movement takes place.


Comparison Of
LOC RATES
RATE PER THOUSAND FEET
Loc Movement in Miles

The purpose of graph 2 following is to show pictorially the amount of revenue derived from the two rates compared in the preceding graph, in each five mile multiple of distance. The length of haul is shown on the horizontal scale, and the amount of the revenue in dollars is shown on the vertical scale. It will be noted that in the matter of revenue produced there is an even closer approach between the two rates than occurs when the bare rates themselves are compared.


Comparison Of
Log Rate Revenue
Revenue by Five-Mile Multiples
Log Movement in Miles

The purpose of graph 3 following is to still further test the comparison made in the two preceding graphs, and discover whether the same relation exists when cumulative revenues are considered. The revenue accruing in each five mile multiple of distance is cumulated with that accruing in the lesser multiple of distance, preceding, so that there is shown graphically the amount of revenue in dollars produced by the respective scales cumulated for any distance. The distances are scaled horizontally and the amount of revenue vertically. The comparison is even more striking than that observed on the first two graphs. It will be seen that considering the great majority of the movements involved, and the major portion of the revenue produced, the revenue resulting from the application of either scale is practically identical.


Comparison Of
Cumulative
Log Rate Revenue
Cumulative Revenue by Five-Mile Increments
Log Movement in Miles
0
10
20
30
40
50
60
70
80
90
100
110
120
130
140

The defendants in error, in accord with the decision of the Interstate Commerce Commission in "Reduced Rates, 1922," ordered the same reduction in all intrastate log rates in Washington (save those on the lines of the four carriers involved in this case), and such decreased rates are now in effect (Department of Public Works v. Great Northern Ry. Co. et al. No. 5401—Second Annual Report of Dept. of Pub. Works p. 67, Appendix F). Intrastate log rates on the lines of plaintiffs in error were excluded due to the pendency of the instant case (Dept. of Pub. Works v. G. N. Ry. Co. et al. No. 5401 *supra* p. 70, Appendix G). From the foregoing it is clear that the rates named in the order under review instead of creating a discrimination in favor of intrastate commerce, are in truth necessary to remove an existing discrimination favoring interstate commerce. In their order of June 22, 1922 (Appendix G), defendants in error said:

"In the Findings of Fact and Order in consolidated causes Nos. 5159-5330, before this Department, rates for the transportation of logs, intrastate within the State of Washington, were determined as of the date of the order to yield a fair return upon the value of the railway property used in the transportation of logs. Our findings and order in consolidated causes Nos. 5159-5330 were made with knowledge of, and giving full force and effect to, the situation with regard to revenues, operating expenses and traffic conditions generally as shortly thereafter found by the Interstate Commerce Commission in docket No. 13293, "Reduced Rates, 1922," 68 I. C. C. 676. Should the outcome of the writ of review now

being prosecuted against the Department's Findings of Fact and Order in consolidated causes Nos. 5159-5330, be an affirmance in all respects of such Findings of Fact and Order, and the rates therein named become effective accordingly, such rates will yield their just and fair proportionate share of the aggregate revenue contemplated by the Interstate Commerce Commission in Docket No. 13293, and the instant case."

"It is not the purpose of the Department to take mandatory action with respect to the existing log rates within the State of Washington, while same are the subject of a writ of review in the State Court, but in view of the decision of the United States Supreme Court in Railroad Commission of Wisconsin et al., vs. C. B. & Q. Railroad Company, reported in Vol. 10, U. S. Supreme Court Advance Opinion 1921-22, page 236, it is apparent that if the existing log rates within the State of Washington are not reduced by an amount in conformity with the findings and order in causes Nos. 5159-5330, consolidated, effective July 1, 1922, discrimination will exist against the log traffic and the shippers of logs intrastate within the State of Washington and in favor of all other intrastate traffic and all interstate traffic and shippers thereof."

Accordingly, log rates lowered in accord with "Reduced Rates, 1922" are now in effect on the lines of all log carriers in the State of Washington, save the plaintiffs in error. There exists thereby a discrimination among the log shippers of the State which abides the termination of this litigation.

IV.

The Carriers Proposed and Justified Uniformity in Log Rates.

Assignments IV, V, VII, VIII and IX can properly be considered together, as separately and collectively they constitute an attack upon the method pursued by defendants in error in determining the schedule of rates named. As preliminary to our discussion of these assignments it should be stated that, although there is now considerable divergence of position among the carriers as to uniform treatment for all, the issue tendered before the defendants in error and accepted by plaintiffs in error was a reasonable, uniform log tariff for all intrastate movement of that commodity within the State of Washington. The defendants in error after hearing, named such a tariff and ordered its publication. It is not now within the power of plaintiffs in error to qualify the issue. The order is now subject only to the legal requirements to be determined by this court. The course of the proceedings and the testimony taken abundantly show that the carriers clearly understood the issue to be as heretofore stated, and marshalled their proof accordingly. Mr. Dudley, Milwaukee counsel, requested at the outset of the hearing (Record p. 426 fol. 193) that he be informed as to whether it was the purpose of the hearing to establish standard rates, and was advised that this was the intention. Counsel further stated (Rec-

ord p. 427 fol. 195) that the four larger carriers were working together and that it was his assumption the Department's order would probably establish rates which would be identical for all lines, unless some special consideration should be given to particular branches. No such particular situations were developed by the carriers, so that had the Department believed exceptions to the uniform tariff desirable, they had nothing in the record as a basis for such exceptions. The witness Mount testified as follows (Record p. 468 fol. 261):

"* * * in view of the general conditions of the lumber industry and the competition they have to meet, and they are competing in the same general territory, I think we would have to throw the tail in with the hide, so to speak, and put the log rates on one uniform basis for application over the entire state."

It appears from the testimony elsewhere in the record, the witness had in mind the following facts: logs are the raw material from which lumber is made, and the freight rate on the logs to the mill is a controlling figure in the cost of lumber; the lumber milled in the Pacific Northwest moves eastward, and meets the competition of Southern pine in the Chicago territory and the Middle West generally; the carriers here involved are all competing for the eastward lumber haul, and if the rates on logs on the several lines are not on a parity, some mills will be unable to manufacture lumber at a cost which will enable them to sell in the Middle West in competition with other mills

in the Pacific Northwest enjoying a substantially lower log rate. For example, if the log rates on the Oregon-Washington should be raised above the level of rates existing on the lines of the other carriers here involved (to provide for amortization of the North River branch, as here contended for) the inevitable result would be inability of mills on Oregon-Washington lines to enter the common market in the Middle West, and the line would lose the long haul lumber traffic accordingly.

The witness Mount also detailed the joint operation of the Oregon-Washington with other roads as a further reason for the adoption of a uniform log tariff. Mr. Robbins, counsel for this carrier interrogated the witness as follows (Record p. 816, fol. 875):

"Q. As I understand it, the O.-W. R. R. & N. would be satisfied with adjustment on rates made in connection with the other roads?

"A. We will have to be in a general way. The operations of the O.-W. R. R. & N. are in the same general territory as these other roads, and all of the log traffic in the State of Washington on the O.-W. R. R. & N. is on the line between Portland and Spokane, exclusively in Washington, as between Vancouver, Washington, and Tacoma, including Grays Harbor country, Tenino branch, Olympia branch; the main line is operated jointly with the Great Northern and the Northern Pacific; the Grays Harbor line is operated jointly with the Milwaukee, and the Portland by the Northern Pacific; and the Northern Pacific also operates into Olympia; we have two other branches which you might call independent branches, the Tenino branch, only about five miles long, and the Primo branch from Columbia River

Junction to Vista, 15 miles long; so it is very evident that if we were entitled to greater rates, we would not secure any greater rate than the Commission would grant to these other carriers."

The carriers tendered for consideration several uniform distance tariffs during the course of the hearings. Their proposed Tariff 29 is such a uniform distance tariff.

V.

Carrier Exhibits Admittedly Burden Cost of Haul for Intrastate Traffic With Expense of Assembling and Distributing Interstate Traffic.

Findings IX and X (Record p. 23) of the Department compare the methods of revenue and expense assignment employed respectively by the carriers and the Department, and should be considered together with respect to the assignments directed against them. Finding IX first points out the methods employed by the carriers in assigning revenues and operating expenses when it is sought to segregate State of Washington results from the results on the systems as a whole. From this flows the incongruous result pointed out in Finding IX. Were this result arrived at by a correct method, it would point unmistakably to large error in the figures employed by the accountants, or to grossly inefficient operation, or both within the State of Washington. The fallacy is in the different method of assigning revenues and expenses. Assignment of revenues to the portions of a transcontinental system upon a

straight mileage basis gives results that are fair indications of the performance of the several portions, if expenses be assigned upon a comparable basis. The carrier figures improperly compare with and set off against revenue determined upon a mileage basis, expenses in gross incident to the assembling and termination of transcontinental shipments. The result, as pointed out, is a unit freight operating expense for the State of Washington which is grossly disproportionate, unfair, and loaded with total expenses of assembly and distribution, which should be spread equitably throughout the system involved. The carrier witnesses themselves did not attempt to justify this improper expense assignment when their attention was directed to it, and announced the roads were now considering a more equitable way of dividing expenses between states (Peterson Record p. 603, fol. 496; Vivian—Record p. 619, fol. 521). In this connection it should be noted that expense of assembly and distribution is a much more inclusive figure than terminal expense, and the exhibits and testimony of appellants regarding exclusion of terminal expense are admittedly inadequate when expense of assembly and distribution are considered.

Error in Finding X is further assigned on brief upon the ground that "The unit freight operating cost within the State of Washington, regardless of the manner in which terminal expenses may be charged, is greater than the average unit system freight operating cost, in that in the State of Wash-

ington there is a greater proportion of branch line mileage on many of the railroads, if not on all of them." The record flatly contradicts this assignment. The distinction heretofore pointed out between terminal expense and the far more comprehensive expense of assembly and distribution, as recognized by carrier counsel at the hearing, is wholly disregarded. Branch lines and the expense incurred thereon are peculiarly a feature of terminal division operation. Their existence is essential to afford sufficient volume of traffic to render main line operation possible and profitable. The witness Calderhead indicated (Record p. 837, fol. 913) that Washington terminal expense, properly analyzed, includes the cost of assembling cars from branch lines to consolidated main line train loads, and the witness Gray testified (Record p. 841, fol. 920) that the whole Puget Sound district is a mass of large general terminals, the entire expense of which under carrier accounting falls upon the State of Washington. In support of the foregoing assignment it is also asserted on brief that "the average haul within the State of Washington which has an important relation to the unit cost, is much less than on the system on all of the lines." It would be phenomenal were this difference in average haul, state as compared with system, found not to exist. The same difference will be found to exist if the average haul within any state be compared with the average haul on the system passing through that state. Intrastate commerce is essentially an aggregation of short hauls,

while interstate commerce preponderates in transcontinental movements. As heretofore pointed out, the carriers so far as revenues are concerned, recognize the composite character of the freight receipts in any state, and by mileage assignment spread these receipts which flow from the operation as a whole over the entire system. So far, however, as expense particularly incurred within the State of Washington for interstate assembly and distribution are concerned, the carriers refuse to adopt an assignment comparable to that used for revenue distribution, with distortion of results as we have seen. It was not claimed that Washington branch line costs are out of proportion to other branch lines costs (daPonte, Record p. 713, fol. 684). It is further assigned as a basis for error that the Department's treatment of the case is improper because geographical, physical, climatic, operating and traffic conditions are different in the State of Washington than elsewhere on the systems. The conditions affecting transportation undoubtedly vary in different localities, but the fairest accounting treatment is that which spreads these differences over the systems in question. The relation between intrastate and interstate commerce so far as the receipts and expenses are concerned, has been heretofore stressed, and the interdependence of state and system operation pointed out. Obviously, intermediate divisions of transcontinental systems, where such divisions originate little traffic, would be almost devoid of traffic were it not for originating and ter-

minal divisions. Nor could freight originating in a terminal division be handled to destination without intermediate divisions. The functions of the two sorts of divisions are reciprocal, and proper accounting takes cognizance of the common service performed by adopting expense units which spread the traffic differences. The appellants recognize these considerations, but make use of them both as sword and shield. They emphasize the expense of certain traffic as affecting the cost of service, but refuse to spread expense incident to system hauls. So far as logs, the commodity under consideration, is concerned, the practice of respondents in employing unit freight operating cost is eminently fair, for the witness Turnburke, statistician for the Great Northern Railway, testified (Record p. 807, fol. 859) as follows:

"Mr. Calderhead: In making up this Exhibit No. 23, did you find any particular part of operating expenses affecting the movement of logs that did not apply to other traffic?

"A. What do you mean?

"Mr. Calderhead: Was there any particular item of expense in connection with the movement of logs that would not apply to movement of lumber, for instance?

"A. I can not think of any, if there is any.

"Mr. Calderhead: So that the operating expense covering the movement of logs would be approximately the same as for handling any other traffic that moves in large volume?

"A. Yes, sir, I would say so."

As to the foregoing assignments and others of the same sort in this connection, the facts of climate

and geography are such as may be judicially noticed without specific inclusion in the record, and as to traffic and operating conditions there is ample within the record upon which defendants in error were empowered to apply their informed judgment, culminating in a result which under well settled rules is reasonable and lawful and entitled to be sustained.

Criticism of the use of the average operating cost per thousand gross ton miles is self contradictory in view of the express carrier sanction of this method. The witness Nicholson, General Manager of the Milwaukee, fully explained and adopted this as the proper method of determining the costs (Record p. 401, fol. 151). He declared the cost per thousand gross ton miles was the foundation of all railroad accounting; that the Interstate Commerce Commission uses this method and other of the carriers themselves use this method. When the Department now uses this method as its means of determining costs, the carriers contend that this is entirely improper, making an absolute aboutface from their former position. C., M. & St. P. Ry. Co.'s Exhibits Nos. 10, 11, 12, 13, 14 and 15 (Record pp. 201, 202, 203, 204) are all based upon the per thousand gross ton mile unit. The fundamental defect of the carrier exhibits, as contended before, is that in assigning their costs, they have included the distributing and assembling expense of handling interstate freight, which should not properly be borne and assessed against intrastate freight. This is the inevitable result of confining the

calculation to terminal divisions. The record (Record p. 725, fol. 707) contains the following testimony of the witness Peterson, statistician for the Northern Pacific Railway Company:

"Mr. Peterson: The fact of the matter is the terminal expense as shown here is rather high; it is admitted it is 16 cents per estimated car mile.

"Mr. Calderhead: For the average length of the haul?

"Mr. Peterson: Yes, and it wouldn't of course be correct to assess all of that to any particular commodity, we admit that.

"Mr. Clifford: Certainly. But considering now a terminal division and what we might call an intermediate division, is it fair to say that you can take any particular commodity moving locally in a terminal division and assess it at a pro rated cost of all costs incurred in that terminal division, and say that that is a fair rate of costs assignable to that commodity?

"Mr. Peterson: There are certain costs, of course, that are overhead expenses; are you referring to direct terminal—

Mr. Clifford: I am comparing now a terminal division and an intermediate division, one which is not burdened with terminals.

"Mr. Peterson: Yes—

"Mr. Clifford: And I am asking if it is a fact if you arbitrarily determine the cost figures as for any particular commodity moving solely within a terminal division with respect to the lighter costs upon intermediate division, if you unduly load that commodity with costs?

"Mr. Peterson: Yes, you are correct."

It is argued that the unit cost per one thousand gross ton miles, which the carrier witness Nicholson

explained and approved without reservation (Record p. 401, fol. 151) can not be applied to the operations of the systems involved for the purpose of obtaining a unit cost for the State of Washington. The reason assigned is that the unit cost of freight operation in the State of Washington is at least thirty-five per cent higher than the unit cost of the combined systems. We remark here that the only figures which apparently show this alleged greater unit cost intrastate are the carrier figures burdened with general terminal, tax, assembly and distribution expenses, the major portions of which should be spread equitably over the entire systems involved. This fundamental error was admitted (Record p. 725 fol. 707) and carrier witnesses indicated revision of accounting methods was being considered to eliminate this inequity (Peterson, Record p. 603, fol. 496; Vivian, Record p. 619 fol. 521). When, therefore, disagreement is shown between carrier figures and those in the findings and order of the Department, and error is predicated thereon without more, it is obvious that the disagreement is due to the faulty method of cost assignment employed by the carriers. Treatment of carrier rates, earnings and valuations by systems and groups is now required by Federal law and precedent, as we shall presently point out, and it would be error for the Department to base rates irrespective of system and group operating results.

VI.

A Rate Base for Log Rate Determination Has Been Fairly and Adequately Allowed by the Department.

Despite the carriers' approval at the hearing of joint consideration and treatment in the determination of reasonable log rates, the assignments attack the findings with regard to the value of carrier property used and useful in the public service, as improper because of such combined treatment. The respondents were simply adopting a procedure suggested by the carriers themselves, and employed by the Interstate Commerce Commission in Ex Parte 74 (58 I. C. C. 220, 255) in conformity with the provisions of section 15a of the Transportation Act of 1920 (41 Stat. at L. 488), approved February 28, 1920. A portion of this section reads as follows:

"In the exercise of its power to prescribe just and reasonable rates the Commission shall initiate, modify, establish or adjust such rates so that carriers as a whole (or as a whole in each of such rate groups or territories as the Commission may from time to time designate) will, under honest, efficient and economical management and reasonable expenditures for maintenance of way, structures and equipment, earn an aggregate annual net railway operating income equal, as nearly as may be, to a fair return upon the aggregate value of the railway property of such carriers held for and used in the service of transportation: *Provided,* That the Commission shall have reasonable latitude to modify or adjust any particular rate which it may find to be unjust or unreason-

able, and to prescribe different rates for different sections of the country."

In Ex Parte 74, *supra*, the Interstate Commerce Commission found in part as follows (p. 229):

"From a consideration of all of the facts and matters of record, and those which, under section 15a of the Interstate Commerce Act, we are both required and authorized to consider, we find that the value of the steam-railway property of the carriers subject to the act held for and used in the service of transportation is, for the purposes of this particular case, to be taken as approximating the following:

Eastern group, as defined by the carriers	$8,800,000,000
Southern group, as defined by the carriers	2,000,000,000
Western group, as defined by the carriers, including both the western and Mountain-Pacific groups herein designated	8,100,000,000
Total	$18,900,000,000"

In *Railroad Commission of Wisconsin v. C. B. & Q. R. R. Co.*, 257 U. S. 563, 587, the Supreme Court quoted the "aggregate value" provision of the Transportation Act of 1920, as answering the contention that intrastate and interstate railroad plant should receive separate consideration. It was there said:

"Counsel for appellants are driven by the logic of their position to maintain that the valuation required for the purposes of Section 15a to be ascertained pursuant to Section 19a of the Interstate Commerce Act (March 1, 1913, 37 Stat. at L. 701, Chapter 93, Comp. Stat. Section 8591, 4 Fed. Stat. Anno. 2d ed. p. 495; amended February 28, 1920, 41 Stat. at L.

493, chap. 91) is to be only of that part of the property and equipment of the interstate carriers which is used in commerce among the states, and must be segregated from that used in intrastate commerce. This is contrary to the construction which, since the enactment of Section 19a, March 1, 1913, the Commission has put upon that section in carrying out its injunction. It is inadmissible. The language of Section 15a refutes such interpretation. The percentage is to be calculated on 'the aggregate value of the railway property of such carriers held for and used in the service of transportation.' To impose on the Commission the duty of separating property used in the two services when so much of it is used in both, and to do this in a reasonably short time for practical use, as contemplated by the statute, would be to assign it a well-nigh impossible task. This, of itself, prevents our giving the words such a construction unless they clearly require it. They certainly do not."

The Interstate Commerce Commission in its order in Reduced Rates 1922, 68 I. C. C. 676, reemployed the values found in Ex Parte 74, *supra*. The Commission said (p. 684):

"In the instant proceeding there is little of record which goes directly to the subject of value. There has been a general acceptance by carriers and shippers of the value taken in our former determination as an appropriate basis for the purposes of the present proceeding. The respondent carriers have not attempted to show that that value should be increased, other than by appropriate consideration of the subsequent increments to the transportation plant. We have before us deductions made by certain of the State commissions and shippers, based upon the results of the valuation work under section 19a of the interstate commerce act so far as an-

nounced, and also computations based upon the market value of outstanding stocks and bonds.

"More than 20 months have passed since our former determination, and in that period the valuation of the railroads under section 19a has gone forward. The work is still incomplete, but has progressed to such an extent that we may accept the results with fuller assurance, both as to particular roads and as showing general trends and principles. In our administration of various sections of the act, and in our certification of standard return for the purposes of the Federal control act, we have had occasion to make further investigation and corrections of investment accounts of the carriers.

"The various other values and elements of value, as set forth in Increased Rates, 1920, *supra*, pages 228-229, have been reexamined in the light of the present record and the requirements of section 15a. We find no present reason to disturb the value taken by us in that proceeding as approximating the sums there stated, except to the extent that subsequent additions to or withdrawals from the property in service, including materials and supplies and working capital, and further depreciation, make adjustment necessary. Whether the value taken by us in 1920 should stand without consideration of these later items or not, the difference would be reflected only in fractions of per cents of the returns hereinafter indicated as the results of operation."

It is too late to challenge the propriety of a method of rate base determination prescribed by Federal statute and administered by the Federal regulatory body.

The Department in Finding XV (Record p. 26) stated that it would assume the value of the property of the four carriers within the State of Washington which is in any way *used or useful* in connection with

the log traffic, to be $300,000,000. In determining this figure, there were of record the figures introduced by the Great Northern in Great Northern Exhibit No. 25 (Record p. 308—Stip. & Add. Rec. p. 23), these being the 1921 proceedings of the State Equalization Committee, and the findings of the Washington Railroad Commission. The Chicago, Milwaukee & St. Paul Railway was never valued by the Railroad Commission, but the Northern Pacific, Great Northern and the Oregon-Washington Railroad & Navigation Company were valued.

It must be borne in mind that of the total mileage within the state at least 50 per cent is not used in the log traffic. The total of the main track mileage within the state is shown in Exhibit No. 25 of the Great Northern to be 4,936 miles. If the total mileage west of the Cascades to which the logging traffic is almost exclusively confined (determinable also from G. N. Ex. No. 25), were secured, it would be found that this main track mileage is 1,683 miles, which is just about one-third of the total mileage of the state, and it therefore appears that the Department was extremely generous in taking as a basis the value of $300,000,000.

The Chicago, Milwaukee & St. Paul Railway introduced evidence upon the book value of its line. Its Exhibit "1" (Stip. & Add. Record p. 16) bears the following:

"Note—The valuation of this Company's property by the Interstate Commerce Commission is not

yet completed; the inventory of physical quantities has been made, but is not yet summarized and a start has not yet been made on the pricing. The company has no reliable information at the present time upon which to state the fair value of the railroad property in the State of Washington."

The Northern Pacific Railway introduced evidence showing its computations with the Interstate Commerce Commission, which body has not, however, issued any formal or informal statement of total valuation within the State of Washington. A division engineer and a chief clerk testified they had been engaged in the preparation of a valuation of this carrier. There were portions of the valuation for which they had prepared figures, but the comparable figures prepared by engineers for the Interstate Commerce Commission were not known to them. They assumed from prior experience the extent of the difference would be ten per cent. There were duplicate reports still to be received, a protest to be filed and a parley with an adjuster (Allen, Record p. 707, fol. 674; Bryan, Record p. 702, fol. 666). The Great Northern Railway accepted as its basis the figures shown in Exhibit No. 25 of the Great Northern; the Oregon-Washington Railroad & Navigation Company introduced figures showing the value of its Primo-North River Junction branch. The carriers did not introduce statistics to show what could be considered as the actual value of property used and useful for the transportation of logs so that the Department

could make a finding upon this basis, if the same were proper.

The decisions of this court are directly applicable where, as here, there has been such a manifest failure of proof. In the Minnesota Rate Cases, 230 U. S. 352, it was said (p. 466):

"As neither the share of the expenses properly attributable to the intrastate business, nor the value of the property employed in it, was satisfactorily shown, and hence it did not appear upon the facts proved that a fair return had been denied to the company, we are of the opinion that the complainant failed to sustain his bill."

In *Northern Pacific Ry. Co. v. North Dakota,* 216 U. S. 579, it was said (p. 580):

"But laying technical objections on one side and taking the facts as admitted, the argument for the State showed that there are too many elements of uncertainty in the calculation for us to say, if we could, as to which we intimate no opinion, that the conclusion is proved, when the Supreme Court of the State says that it is not."

Seaboard Air Line v. Florida, 203 U. S. 261;
Minneapolis & St. Louis R. R. Co. v. Minnesota, 186 U. S. 257, 264.

In this connection it is of special interest to note that the witness Nicholson stated (Record p. 408 fol. 162) the value per mile of the right of way, track, bridges, etc., should be $25,000. He doubted whether it would be possible to build a railroad such as is used to haul their traffic (Milwaukee) on for twice the amount mentioned in this estimate, but stated he

estimated that of the trackage, one-third is devoted to the logging service and the other two-thirds to general commercial business. The Department in assessing the value of $300,000,000 upon the mileage of 4,936, has allowed a value of $60,777 per mile of road. Surely in view of the testimony of the witness Nicholson this value is more than reasonable, and it might appear the loggers could complain rather than the carriers as to the value assessed by the Department. In *Ex Parte* 74, the I. C. C. assigns $8,100,000,000 as the value for rate making purposes of the carrier properties in the Western and Mountain-Pacific groups (58 I. C. C. 220, 229). This figure is as of October 31, 1919, and covers 138,243.74 aggregate mileage (p. 237). The value assigned per mile is therefore approximately $57,000. The grouping to which this applies includes expensive double track and terminal in the middle west. Certainly, the Department's figure of $60,777 per mile is entirely fair. Where, as here, final figures were unobtainable, and the evidence was conflicting, the Department's figures arrived at from such dependable data as was available, are lawful and reasonable.

VII.

Group Consideration of Competitive Carriers in Rate Making is Required by Federal Law and Precedent.

The fundamental objection upon which each and all of the carriers make their attack upon the order of the Department is against consideration of the

railroads involved as a group. If the Department's procedure in this respect is correct the carrier case falls, for there is no challenge of the figures themselves, nor indeed could there be, since they are all taken from the annual reports and exhibits of the carriers. Many cases are cited (all antedating the Transportation Act of 1920 and subsequent decisions of the United States Supreme Court and Interstate Commerce Commission) which it is contended are authority for the proposition that rates must be determined from consideration of the results on a particular division or road. Assuming but not admitting that these cases hold as contended, they have been entirely superseded by subsequent legislation and decision. The establishment of the rule which the Department now applies may be clearly traced by examining in turn the Transportation Act of 1920 (41 Stat. at L. 484, chap. 91), *Railroad Commission of Wisconsin v. C. B. & Q. R. R. Co.*, 257 U. S. 563, and the case of the Interstate Commerce Commission entitled Reduced Rates 1922, 68 I. C. C. 676. The Transportation Act provides in part (Sec. 15a [2]):

"In the exercise of its power to prescribe just and reasonable rates the Commission shall initiate, modify, establish or adjust such rates *so that carriers as a whole (or as a whole in each of such rate groups or territories as the Commission may from time to time designate)* will, under honest, efficient and economical management and reasonable expenditures for maintenance of way, structures and equipment, earn *an aggregate annual net railway operating income* equal, as nearly as may be, *to a fair return upon*

the aggregate value of the railway property of such carriers held for and used in the service of transportation * * *" (Italics ours.)

In the Wisconsin case, *supra,* the Supreme Court interpreted the language quoted. The history of interstate commerce legislation and decision was reviewed, and with respect to Sec. 15a it was said (p. 241):

"The latter, the most novel and most important feature of the act, requires the Commission so to prescribe rates as to enable the *carriers as a whole, or in groups* selected by the Commission, to earn an *aggregate annual net railway operating income* equal to a *fair return on the aggregate value of the railway property* used in transportation." (p. 242.) "It is manifest from this very condensed recital that the act made *a new departure. Theretofore* the control which Congress through the Interstate Commerce Commission, exercised, was primarily for the purpose of preventing injustice by unreasonable or discriminatory rates against persons and localities, and the only provisions of the law that inured to the benefit of the carriers were the requirement that the rates should be reasonable in the sense of furnishing an adequate compensation for the particular service rendered, and the abolition of rebates. *The new measure* imposed an affirmative duty on the Interstate Commerce Commission to fix rates and to take other important steps to maintain an adequate railway service for the people of the United States. This is expressly declared in Sec. 15a to be one of the purposes of the bill" (Italics ours).

Mindful of the language of the statute and the decision of the Supreme Court, and with express reference to both, the Interstate Commerce Commission made its decision in Reduced Rates 1922, *supra.* The

plant value used to calculate the return was the aggregate of the railway properties in the several groups—$18,900,000,000 (68 I. C. C. 684-685). There was no segregation or consideration of railway properties by systems, much less by divisions. The revenues and expenses tabulated and considered were those of Class I roads (those having an annual gross operating revenue of $1,000,000 or more) only (68 I. C. C. 685-689). The fair return found was "5.75 per cent of such aggregate property value as a uniform percentage for all rate groups or territories designated by this commission." (68 I. C. C. 734.) No provision was made (nor could be made under the statute and decisions cited) for the amortization of the value of railroad property, as contended for in the instant case by the O.-W. R. R. & N. Co. The same return was provided for the so-called weak and strong roads, as is the case here. The carriers are complying with Federal law and regulatory decision.

In the New England Divisions Case, 261 U. S. 184, objection to joint consideration, and decision upon typical evidence, was raised. The court said (p. 197):

"For many years before the enactment of Transportation Act, 1920, it had been necessary, from time to time, to adjudicate comprehensively upon substantially all rates in a large territory. When such rate changes were applied for, the Commission made them by a single order; and, in large part, on evidence deemed typical of the whole rate structure. This remained a common practice after the burden of proof to show that a proposed increase of any rate

was reasonable had been declared, by act of June 18, 1910, c. 309, Section 12, 36 Stat. 539, 551, 552, to be upon the carrier. Thus, the practice did not have its origin in the group system of rate-making provided for in 1920 by the new Section 15a. It was the actual necessities of procedure, and administration which had led to the adoption of that method, in passing upon the reasonableness of proposed rate increases. The necessity of adopting a similar course when multitudes of divisions were to be passed upon was obvious. The method was equally appropriate in such enquiries; and we must assume that Congress intended to confer upon the Commission power to pursue it."

"That there is no constitutional obstacle to the adoption of the method pursued is clear. Congress may, consistently with the due process clause, create rebuttable presumptions, *Mobile, Jackson & Kansas City R. R. Co. v. Turnipseed,* 219 U. S. 35; *Lindsley v. Natural Carbonic Gas Co.,* 220 U. S. 61; and shift the burden of proof, *Minneapolis & St. Louis R. R. Co. v. Railroad & Warehouse Commission,* 193 U. S. 53. It might, therefore, have declared in terms, that if the Commission finds that evidence introduced is typical of traffic and operating conditions, and of the joint rates and divisions, of the carriers of a group, it may be accepted as *prima facie* evidence bearing upon the proper divisions of each joint rate of every carrier in that group. Congress did so provide, in effect, when it imposed upon the Commission the duty of determining the divisions. For only in that way could the task be performed. As pointed out in *Railroad Commission of Wisconsin v. Chicago, Burlington & Quincy R. R. Co.,* 257 U. S. 563, 579, serious injustice to any carrier could be avoided, by availing of the saving clause which allows anyone to except itself from the order, in whole, or in part, on proper showing."

In *Groesbeck v. Duluth, S. S. & A. Ry. Co.*, 250 U. S. 607, 611, the doctrine of averages as applied to railroad costs was approved. In the *Wisconsin* case, *supra*, it was said with respect to the Transportation Act of 1920 that (p. 586):

"The effective operation of the act will reasonably and justly require that intrastate traffic should pay a fair proportionate share of the cost of maintaining an adequate railway system."

The order here involved is a full discharge by the regulatory authority of the State of Washington of this paramount obligation to sustain intrastate the rate level prescribed interstate.

VIII.

PROPERTY TAX IS EQUITABLY ASSIGNED—INCOME TAX EXCLUSION IS COMPENSATED BY ADEQUATE RETURN.

The sixth assignment reads as follows:

"The Supreme Court of the State of Washington erred in affirming the order of the Department of Public Works, for the reason that said order inadequately apportioned ad valorem taxes to the property devoted to the transportation of logs, and refused to allow anything for federal income taxes, and thereby deprived plaintiffs in error and each of them of a just return on the value of their property, contrary to the Fourteenth Amendment to the Constitution of the United States."

The Department's Finding XII (Record p. 24) is as follows:

"Various exhibits were introduced by the associated log shippers and by the carriers to show the financial results from log transportation within the

state during the year 1920, the most important of these exhibits being Associated Log Shippers Revised Exhibit No. 4, and the Great Northern Railway Company's Exhibit No. 24. These exhibits were decidedly conflicting. Without attempting to pass upon the comparative merits of these exhibits, we find that Great Northern Exhibit No. 24 contains certain errors and improper assumptions, to-wit:

"(a) In establishing the relation between the 1920 taxes and gross earnings, system non-operating revenues to the amount of $12,291,544 were omitted, the result being an unwarranted increase in the amount of taxes assigned to the log traffic.

"(b) In listing the system taxes paid, income taxes to the amount of $3,508,928 were included, of which $643,101 were charged to the State of Washington.

"(c) Owing to the fact that the log traffic is for the most part handled upon comparatively inexpensive branch lines; and to the fact that it makes practically no use of the costly terminals; and to the further fact that the rolling stock used in the handling of same has a comparatively low cost, it seems unfair to assess against the log traffic its exact prorata of taxes based on gross earnings. An assessment of approximately 50 per cent of its prorata of taxes on such basis should be sufficient. * * * "

The omission of non-operating revenue in the carrier assignment of taxes is one of the most glaring errors in the calculations of appellants in error. An examination of the portions of the annual reports of the four carriers to the Department included in this record will show that on page 300 of these reports (the reports for 1920) the non-operating income disregarded in the carrier exhibit is included. Consistent with the theory pursued in the carrier ex-

hibits, these revenues should have been included in determining the proportion of taxes to be assigned. The revenue figures, which were omitted in the carrier calculation as taken from the annual reports, are the following:

Chicago, Milwaukee & St. Paul Ry. (Record p. 271 fol. 342.)	$ 615,429
Great Northern Railway Co. (Record p. 308 fol. 426.)	3,672,023
Northern Pacific Railway Co. (Record p. 195 fol. 259.)	7,093,356
Oregon-Wash. Ry. & Nav. Co. (Record p. 316 fol. 487.)	910,736
Total	$12,291,544

The carrier evidence alone amply supports the Departments finding that "the log traffic is for the most part handled upon comparatively inexpensive branch lines." The truth of the finding with regard to the cost of branch lines is readily determinable from the carrier property exhibits and testimony. For example, in Clallam County, the entire operation of the Chicago, Milwaukee and St. Paul Railway is branch line. The valuation statement in Great Northern Exhibit No. 25 (Record p. 308—Stip. & Add. Record p. 23), which is the minutes of the official proceedings of the State Equalization Committee, Session of 1921, shows the real property to be valued at actual value of $14,761.38 per mile. In King County the value of the main line per mile is

$73,806.90; the Everett branch in King County is valued at $25,823.00; the White River branch at $18,451.73. In the case of the Great Northern in Skagit County the main line is valued at $88,432.85, while the branch lines are valued at $26,529.85. In the case of the Northern Pacific Railway in Lewis County the value of the main line is stated as $81,682.42, while the Grays Harbor branch is valued at $32,672.97; the South Bend branch at $28,588.85, and the other branch lines in Lewis County at $24,504.73. In the case of the Oregon-Washington Railroad & Navigation Company the value of the Grays Harbor branch is shown as $33,426.19; other branch lines at $25,069.65. This is further borne out by the actual valuation made by the Railroad Commission of Washington of the Great Northern, Northern Pacific and Oregon-Washington Railroad & Navigation Co., and this valuation case of the Railroad Commission was quite extensively discussed during the course of the hearing.

The inconsiderable use of terminals by log traffic, and the extent to which shippers or consignors provide their own terminal facilities is indicated by the following evidence:

The witness Dow testified (Record p. 372 fol. 103) that the Milwaukee terminals for the handling of logs at Tacoma consisted of two or three yard tracks and the logging dump track. The same witness testified (Record p. 377 fol. 111) that there was no place other than Tacoma on the system of the C. M.

& St. P. Ry. Co., where the railroad owned its logging terminals exclusively but that usually the logging terminals are partly owned by the logging company and partly by the railroad company, the railroad company maintaining the superstructure (the track) and the logging company maintaining the substructure (the piling).

The witness Nicholson testified (Record p. 422 fol. 187) that the C. M. & St. P. Ry. Co. only owns a few dumps, a few have been built by the logging companies, and in some cases the carrier has joined with the logging company. The witness Guild of the O.-W. R. R. & N. Co., testified (Record p. 454 fol. 239) it was his understanding that the Washington Boom Company owned the trestle work and the railroad company owned the tracks in case of that terminal. The witness Peterson testified (Record p. 726 fol. 709) that the log traffic does not participate in the use of terminals to the same extent as other traffic, and (Record p. 551 fol. 403) that there is no great amount of station service in handling logs. From the foregoing and other cumulative evidence of the same sort in the record the Department's finding is abundantly supported. The carrier tax assignment was manifestly excessive and erroneous. The judgment of the regulatory body was exercised upon facts testified to by carrier witnesses themselves.

The exclusion of the income tax from expense is attacked. At the time the Department issued its order herein, there had been no decision of this mat-

ter in the highest court, but the U. S. District Court for the Northern District of Georgia, had on January 27, 1922, handed down a decision in the case of *Georgia Railway & Power Co. v. Railroad Commission of Georgia,* 278 Fed. 242, in which it was held the income tax was not an allowable operating expense. The Supreme Court of the United States has since spoken, and on April 10, 1922, rendered its decision in *Galveston Electric Co. v. Galveston,* 258 U. S. 388, wherein it was held the federal income tax is properly deductible as an operating expense. The Interstate Commerce Commission in its rate reduction order of May 16, 1922, (Reduced Rates 1922—68 I. C. C. 676) in which it determined five and three-fourths per cent of the aggregate value of the railway property of carriers as constituting a fair return thereon on and after March 1, 1922, (superseding an existing six per cent fair return—*Ex Parte* 74, 58 I. C. C. 220) found as follows (p. 683):

"We may observe that a fair return of 5.75 per cent, representing an aggregate annual net railway operating income arrived at after deducting, among other things, the Federal income tax on a return of 6 per cent, would be approximately the equivalent of a fair return of 6 per cent, out of which the Federal income tax was payable."

The Department sought in its order to preserve a return of 6 per cent to the carriers (Finding XX), and therefore the change in accounting practive established by the decision of the Supreme Court at best results only in harmless error.

IX.

TARIFF 29 IS COMPILED FROM PERCENTAGE INCREASE OF PAPER RATES—THE DEPARTMENT'S SCALE IS BASED UPON STUDY OF RATES CHARGED AND MOVEMENT THEREON.

The eleventh assignment reads as follows:

"The Supreme Court erred in affirming the order of the Department of Public Works which cancelled Tariff No. 29 prescribing a schedule of advanced log rates no higher than plaintiffs in error and each of them are entitled to for the transportation of logs, and thereby plaintiffs in error and each of them are deprived of their property without due process of law and denied the equal protection of the law in violation of the Fourteenth Amendment to the Constitution of the United States."

Despite the statements in the carrier briefs, there is nothing in the record directly upon Tariff 29, for the very good reason that the same was not submitted until after the case was concluded. A reference to page 42 of the brief now submitted by Mr. Charles W. Bunn and to page 131 of the brief of the Northern Pacific, Great Northern and Oregon-Washington, and an examination of the schedules there set forth shows the manner of constructing Tariff 29. Compare first the schedule under the caption "Rates Excluding Puget Sound Terminals" in column 3 with the schedule under the caption "Proposed Rates S. J. Henry No. 29" in column 5. Column 5 is produced by increasing the rates in column 3 severally to the nearest multiple of 10. There is one exception

—the rate for the distance 6 to 10 miles is increased an additional 5 cents to make $2.25. Note here that column 3 is the alleged compensatory rate proposed by the Northern Pacific Railway. Also that column 3 is based on Northern Pacific Exhibit No. 17, which it is alleged excludes expense of Tacoma, Seattle and Auburn terminals, but admittedly does not exclude or equitably apportion the much greater expense of assembling and distributing interstate freight. Compare now column 3 with column 1, under the caption "Present Rates Incl. 25% Advance Aug. 26, 1920, Distance Scale." Column 3 is produced by increasing each rate in column 1 approximately 26.8%. Column 1, as indicated by the caption, is the schedule of distance rates. These are the rates referred to by the carriers on brief as being paper rates upon which no traffic moved. The rates charged the shippers are the commodity and contract rates. It therefore appears that no particular skill or traffic knowledge was employed in producing Tariff No. 29. Compare with this arbitrary percentage increase upon paper rates, employed by the carriers to evolve Tariff 29 and claimed to produce a proper result, the computations of the Department based upon the rates actually charged and the traffic actually moved as shown in Department's Exhibit "C" (Record p. 72 fol. 194-1), and graphically explained in our discussion under assignment III.

Column 3 (Northern Pacific Exhibit 47, p. 6) was proposed by the witness Peterson (Record p. 738

fol. 730) as a compensatory rate (i. e., a rate yielding sufficient revenue to pay all expenses and a 6% return based on 1920 traffic) upon a certain carrier assignment of expense. It is interesting now to read the statements in the carrier briefs that Tariff 29 is less than the carriers are entitled to as a matter of law, and that Tariff 29, even if compensatory to the Northern Pacific is non-compensatory to the other companies. The witness Nicholson proposed (Record p. 414 fol. 171) a compensatory schedule, which for the distances 11-20 miles and 21-30 miles is considerably less than Tariff 29 for the same distances; and it is significant that the major portion of the log movement is for hauls within these distances (Dep'ts Ex. C). The record will show that respecting all the schedules proposed by the carriers, their witnesses were unwilling to advance the opinion that they would move the traffic. For example the witness Mount was proposing comparison with a rate of $2.70 for 10 miles or less, as applicable in the southern pine region. Query as to what Washington traffic would bear was brought to his attention and he testified as follows (Record p. 470 fol. 265):

"From a strictly operating standpoint and a comparison of rates with other commodities, a rate higher than $2.70 might be a reasonable rate in this territory for the transportation of logs. But as you state business is in a very demoralized condition apparently at this time on account of conditions not directly connected with the transportation business, but due principally to economic and banking conditions over the country and I would not feel disposed

as a traffic man wanting to build up business, putting in a rate at this time of $2.70 per thousand."

X.

The Provision For a Test Period is Approved by Precedent and Affirms Reasonable Regulation.

The twelfth assignment attacks the provision for a test period. The defendants in error provided in paragraph XIX (Record p. 27) of their order as follows:

"In order to test the workings of this tariff, it is provided that the same shall remain in effect during an experimental period of twelve months from the date it becomes effective, and if at the end of such experimental period the tariff contained in the attached order is found to be oppressive to the carriers or to the log shippers, a rehearing may be had before this Department upon the matters involved in this order."

The practice of testing rates by experience is one which has repeatedly received the sanction of the courts. The considerations which dictate the propriety of the practice here, are these. (a) A lawful, non-discriminating tariff is prescribed to supersede a tariff which has been discriminatory from its inception and made more so in recent years by cumulative percentage advances totalling 56¼ per cent (Record p. 27—Finding XVIII). (b) Discriminatory rate contracts are ordered abolished (Record p. 29—Finding XXVII). (c) Co-existing discriminatory single car and trainload rates in the same territory and pub-

lished in the same tariffs are ordered abolished (Record p. 73—Department's Ex. "A"; Record p. 28—Finding XXII). (d) Use of equipment with or without log bunks is provided for, and the rate differs accordingly (Record p. 28—Finding XXIII). (e) An equitable method of determining minimum loads is provided to supersede existing inequities (Record p. 29—Finding XXIV). (f) Lack of uniformity in scaling logs for the purpose of applying rates is condemned and appropriate action required (Record p. 29—Finding XXVI). (g) With regard to future results, the volume of the traffic moved, and the change in operating ratio due to the fact that operating expenses do not increase proportionately with increased volume of traffic, are largely determinative of the rate earned (Record p. 27—Finding XX).

The assignment challenges the constitutionality of the order because of the provision for a test period. The holding of this court in the New England Divisions Case, 261 U. S. 184 is particularly applicable here. It was there said (p. 201):

"A hearing may be a full one, although the evidence introduced does not enable the tribunal to dispose of the issues completely or permanently; and although the tribunal is convinced, when entering the order thereon, that, upon further investigation, some changes in it will have to be made. To grant under such circumstances immediate relief, subject to later readjustments, was no more a transfer of revenues pending a decision, than was the like action, in cases involving general increases in rates, a transfer of revenues from the pockets of the shippers to the

treasury of the carriers. That the order is not obnoxious to the due process clause, because provisional, is clear. If this were not so, most temporary injunctions would violate the Constitution."

In *Landon v. Public Utilities Commission*, 234 Fed. 152-157, it was said:

"It has frequently been the practice of courts when one came to it to ask such equitable relief as is here sought to require as a condition to listening to the application, that the rates fixed by the commission should be first tested, and then the matter should be determined as to whether or not they were confiscatory."

In *Des Moines Gas Co. v. Des Moines*, 238 U. S. 153, it was said:

"Nor do we think that there was error in refusing an injunction upon the conclusion reached that a return of six per cent per annum on the valuation would not be confiscatory. This is especially true in view of the fact that the ordinance was attacked before there was opportunity to test its results by actual experience."

In *Tilley v. Railroad Co.*, 5 Fed. 641, the court discussed the same principle in the following language:

"The officers of the railroad company declare that the rates fixed by the commission will so reduce its income that it will not suffice to pay the running expenses of the road and the interest on its bonded debt, leaving nothing for dividends for stockholders. The railroad commissioners assert that their schedule was framed to produce 8 per cent income on the value of the road after paying cost of maintenance and running expenses. Which view is the correct one is impossible to decide from the evidence submitted. There

is, however, a conclusive way, and it seems to me the only one, by which this controversy can be settled, and that is by experiment. A reduction of the railroad charges is not always followed by a reduction of either gross or net income. It can soon be settled which is right—the railroad company's officers or the railroad commission—in their view of the effect of the commission's tariff or rates, by allowing the tariff to go into operation. If it turns out that the views of the railroad company are correct, and that the schedule fixed by the commission is too low to afford a fair return upon the value of the road, the remedy is plain; for the law makes it the duty of the commissioners from time to time and as often as circumstances require, to change and revise said schedules."

In *St. Louis Railway Co. v. Hadley,* 155 Fed. 220, an application for a preliminary injunction to restrain the attorney general of Missouri from enforcing a maximum passenger rate was denied by the court "to await demonstration of the reasonableness or unreasonableness of such rates, by actual trial for a reasonable length of time."

In *Wilcox v. Consolidated Gas Co.,* 212 U. S. 19, the Supreme Court said:

"The case must be a clear one before the courts ought to be asked to interfere * * * especially before there has been any actual experience of the practical results of such rates."

Accordingly, a decree of the lower court granting an injunction in a water rate case was reversed without prejudice to another suit should practical experience by actual operation prevent the carrier from realizing a fair return, and in the case of *Louisville*

v. Cumberland T. & T. Co., 225 U. S. 430, the court, in passing on a rate said that "The result is too near the dividing line not to make actual experience necessary."

The reasons for the application of this rule are pointed out by the court in *Railroad Commission v. Central Ry. Co.*, 170 Fed. 225, these reasons being the difficulty of deciding this question from an abstract academic standpoint, and the other being that the shipper would not be protected in case the new rate was finally upheld.

In *Central Railway Co. v. McLenden*, 155 Fed. 974, the court, in discussing the same principle, observed:

"There is at least a *prima facie* presumption that a state railroad commission acted in good faith in fixing a rate and that the rate is not confiscatory. The court may decline to hold that the sworn declarations of a bill for injunction and the supporting affidavits outweight the *prima facie* presumption that the action of the commission is valid."

See also *Brush Electric Co. v. Galveston*, 262 U. S. 443, 446.

XI.

THE OREGON-WASHINGTON ROAD IS NOT LEGALLY ENTITLED TO RATES ON ITS NORTH RIVER BRANCH EXCEEDING THE UNIFORM SCALE.

The thirteenth assignment reads as follows:

"The Supreme Court of the State of Washington erred in affirming the order of the Department of Public Works as it peculiarly affects plaintiff in er-

ror, Oregon-Washington Railroad & Navigation Company, for the reason that the Department refused to consider or allow anything for the amortization of the investment of said company in what is known as its North River Branch in this state, and thereby said company was deprived of its property without due process of law and denied the equal protection of the law, in violation of the Fourteenth Amendment to the Constitution of the United States."

To give the court the facts necessary to a correct disposition of this assignment we repeat some matters already dealt with herein. It will be recalled that the Oregon-Washington Railroad & Navigation Company answered the complaint of the Department with the assertion that the existing "rates, charges, rules and regulations are fair, just and reasonable" (Record p. 12). The witness Mount, produced by the same carrier, testified that (Record p. 468, fol. 261):

" * * * in view of the general conditions of the lumber industry and the competition they have to meet, and they are competing in the same general territory, I think we would have to throw the tail in with the hide, so to speak, and put the log rates on one uniform basis for application over the entire state." The same witness described the joint operations of the Oregon-Washington with the other carriers here involved as an additional reason for the adoption of a uniform log tariff (Record p. 816 fol. 875). It is quite apparent that the claim of the Oregon-Washington for rates in excess of those to be charged by the other carriers is an afterthought. It is also evident that because of the competitive situation involving all the plaintiffs in error, and the practical impossibility of the Oregon-Washington moving any traffic on rates substantially higher than the

others, this contention is a makeweight to serve the general purpose of rate increase."

It is significant that the claim of denial of due process is made only with respect to the North River Branch. The language of *St. Louis & San Francisco R. Co. v. Gill*, 156 U. S. 649, 665, is pertinent here. It was there said:

"The company cannot claim the right to earn a net profit from every mile, section, or other part into which the road might be divided nor attack as unjust a regulation which fixed a rate at which some such part would be unremunerative."

But it seems to us that the unanswerable argument to such a contention is that the Congress has destroyed the validity of any claim based upon the operations of a single branch of a railroad by the establishment of rate making for carriers as a whole or in groups.

Transportation Act of 1920 (41 Stat. 484);

Wisconsin R. R. Comm. v. C. B. & Q. R. R. Co., 257 U. S. 563;

New England Divisions Case, 261 U. S. 184;

Dayton-Goose Creek Ry. v. U. S., 263 U. S. 456.

XII.

THE SUPREME COURT, ON WRIT OF ERROR, WILL NOT WEIGH THE PROOF, OR SUBSTITUTE ITS OWN SOLUTION OF AN ADMINISTRATIVE PROBLEM.

The tenth assignment reads as follows:

"The Supreme Court of the State of Washington erred in affirming the order of the Department

of Public Works for the reason that the said order is based upon findings of fact which are not supported by any evidence and which are contrary to the undisputed evidence contained in the record of this case."

As previously set forth herein, the order of defendants in error has heretofore been subjected to a complete review of both law and fact before the Superior and Supreme Courts of the State of Washington. The latter court held as follows (Record p. 57—125 Wash. 594):

"We find that there is proper evidence to support the order of the board of public works."

The decision of the highest court of a state, upon a review of all the evidence, sustaining the order of an administrative body, will not be set aside upon writ of error, solely because the Court may differ in its view as to where the greater weight of evidence lies, or the more expedient solution of the administrative problem involved. Especially has this been the holding where opportunity was given to re-open the issues.

New York & Queens Gas Co. v. McCall, 245 U. S. 345, 351;

Portland Ry. Co. v. Oregon R. R. Comm., 229 U. S. 397, 411;

Cedar Rapids Gas Co. v. Cedar Rapids, 223 U. S. 655, 669;

Waters-Pierce Oil Co. v. Texas, 212 U. S. 86, 107;

Minneapolis & St. Louis R. R. Co. v. Minnesota, 193 U. S. 53, 65.

In the course of this brief and in our motion to dismiss we have referred to and rely upon the decisions of this court defining the limits of the judicial review of administrative action. We are not content to ask affirmance upon the authority of these decisions alone. The carriers have seen fit to thoroughly search this record, and we avail ourselves of the same privilege in answer, confident that whether the examination be confined to the strict limits of judicial review or extended to a weighing of the proof, the record in either case fully supports the findings of fact and order. Thus far we have dealt specifically with matters directly in issue by reason of the assignments of error. In many instances, the case is proved from the mouths of the carrier witnesses, and where such testimony abundantly supports the findings, specific reference to merely cumulative additional testimony has been omitted. We now consider matters of detail with respect to the order attacked, conceiving, however, that they are not matters which this court will examine upon writ of error. We do this in the thought that, with entire respect to other tribunals, we dare say few orders of such length will be found so completely supported by the record on which they depend.

XIII.

Minimum Load.

Findings XXIV and XXV (Record p. 29) dealing with minimum load are as follows:

"The present method of specifying the minimum load per car is inequitable and results in the assessment of excess freight charges against the shipper who upon an average loads more than the minimum per car. A more equitable method would be to designate an average carload minimum based on the number of cars tendered the carrier in any one shipment, and the Department will so order."

"The promulgation of the rules designating an average carload minimum based upon the number of cars tendered the carrier in any one shipment will reduce the revenues of the carriers by an amount equal to the excess charges amounting to about six per cent of the total charges or approximately $150,000 per year, under the scale of rates herein prescribed. We have taken this into consideration and have fixed the basic rate sufficiently high to earn that additional revenue, that is to say, we have prescribed a rate that will produce six per cent more revenue than we would have prescribed had we not changed the rule as to minimum load."

Consideration first of the manner in which the minimum operates shows the support for the findings. The witness Frost made a very clear statement of this as follows (Stip. & Add. Record p. 80 fol. 1085 *et seq.*):

"Mr. Horan: Now I wish you would explain the reason for that variation in the rate actually paid and the rate in the schedules.

"Mr. Frost: The reason for that is that we are required to pay on a minimum of 7,000 feet, and we find it impossible to always load to the 7,000-foot minimum. That is particularly true of small timber, and our timber holdings up there consist of a stand, that is, while I won't say almost exclusively fir, but it is a very solid stand of small and medium growth timber with a small percentage of cedar and a very small percentage of hemlock, and we find that when we undertake to reach this minimum of 7,000 feet with small logs, owing to the number of them on the car that we are unable to do it, or else we build it up to a very unsafe load. Where the logs are larger and scale more for logs we have no trouble at all in reaching the 7,000-foot minimum with a very fine and very safe load. But in instances where you put as we do here 14 to 16 logs to a car—there are 16-log loads (indicating) on which we have 4,588 feet, 4,792 feet, 3,883 feet, 4,645 feet—

"Sup. Spinning: How many logs on that car?

"Mr. Frost: 16 logs on each one of them.

"Sup. Spinning: And were they the length of the car?

"Mr. Frost: Yes, those logs will be cut—well perhaps I had better stop and explain that in view of this question. Logs are cut of standard lengths usually 32 and 40 feet, with a small percentage of 36 foot long when you are asked for them by the log buyer; but in many instances the tree will not measure out so as to make units of 40 or 32 feet and consequently we may get some 28-foot logs or 24-foot logs, but a very small percentage of them. And then again in felling trees, very frequently owing to the character of the ground, the inequalities in it in falling the tree will break, and in that instance we take out or cut out the broken piece in the middle and that interfered with getting the standard length of 32, 36 or 40 feet; so that if you do have a number of short logs and a number of what we might call off

length logs in the way of 28 or maybe 38, as the case may be, we try and save all of the merchantable timber that we can. A large percentage of the logs are 32 and 40 feet with a sprinkling of 36 feet in them. During a portion of the run last year I got a great number of 42-foot logs at the special request of the people to whom I was selling my output."

(Stip. & Add. Record p. 81 fol. 1087):

"Mr. Frost: In order to obviate this excess freight payment—and last year we paid the Great Northern Railroad $5,446.97 in excess freight, in order to obviate that heavy expense to the shippers by reason of this minimum we are constantly undertaking to build up loads of logs that cannot be safely loaded to the minimum of 7,000 feet, and we are sending down over our own roads and down over the common carrier roads loads that are unsafe, where if that minimum was reduced to train average minimum or a shipment minimum we can frequently put perhaps 4,500 feet on one car and maybe 14,000 feet on the next car because of the character of the logs; and my suggestion would be that if I send out a shipment of 20 cars and those cars average more than 7,000 feet that I pay on the actual logs shipped. If they average under the 7,000 feet that I pay for the 7,000 feet. And I make that suggestion to the shippers for their consideration, because there is no question but our unsafe loads, putting loads on that are composed of logs that can be safely loaded to the minimum, and in that connection also I would like to call attention to what seems to me to be the reason for establishing a minimum load of any commodity. The minimum is established for the purpose of inducing or compelling the shipper to load the car to a reasonable capacity and a minimum load should only apply where the shipper has it within his power where he can if he so desires, load to the minimum. But in this shipment of logs the carrier railroads are endeavoring to penalize and do penalize the

shipper for the condition over which he has no control, absolutely none. The physical conditions surrounding his business, the character of the logs themselves are such that no matter how much of a penalty you impose upon him he can not reach that minimum, it is not within his control; and you are penalizing him under this process for something that he cannot help, he cannot avoid, and in his endeavor to avoid that he is turning over to a common carrier railroad loads that are not the safest loads to move.

"Mr. Henderson: Does that also result in some timber being left in the woods that would otherwise be brought out?

"Mr. Frost: It results to a large extent in leaving unusual small logs. You have only to go up into the old log woods to see the small logs. We cannot begin to load to the minimum and we say 'never mind, the freight will cost us $4.00 per thousand on that and we can't afford to take it out;' that happens right along and it results in an economic waste as well."

(Stip. & Add. Record p. 100 fol. 1125):

"Mr. Frost: The cost of logging has from time to time materially increased, and this perhaps may explain the general situation. The logging cost through the Puget Sound is history now; it is higher now than it was six or seven years ago; the cost of logging, getting your logs on the cars and delivering them to the common carrier or to water, depends upon a good many factors; the size and density of the stands of timber; the quality of the timber; the topography of the ground upon which it stands; logging costs are increasing for the reason that timber that was early logged in Puget Sound was timber that was along close to tide water; it was on the flats and on the first benches; railroad construction was easy. The terraine was easy for the men to get over and to work; falling and bucking was less expensive; you got a bigger return per car in thousand feet of product, because on smooth ground the breakage of

the timber is very much less; the timber tributary adjacent to the waters of Puget Sound, that lay upon the ground, easy to log, has been rapidly removed until today, seventy per cent of the timber directly on Puget Sound has been removed; the logging operations have moved farther and farther back; they have gotten into the mountains where the timber is small; the quality of the timber is not so good as that which grew upon the rich bottom lands and lower benches. The density of the stand is not so great; and the logging conditions are very very much harder today where the logger maintains expensive bridges, rock cuts, terrific grades—where railroad construction is very much harder; the falling and bucking cost is much higher, because falling and bucking trees on a hillside is not the same proposition that it is on level ground. The bucker on level ground has nothing to do but to saw the log off. When he gets on a hillside, on rough ground, he has to cut props to put under the fallen tree and prop the tree up, and he spends as much time getting the tree propped up, so when he gets it partially cut up it will not break up, as it don't do on level ground. Then he has to watch for danger, because if the fellers happen to fall a tree up hill to save it, it is likely to fall down hill and kill the fellers. Buckers have the same danger. It is likely to drop off and roll and it makes bucking more difficult. Then when it comes to getting the logs out, and yarding them, we have to haul them up and down hill and over rocks and across canyons, where we used to get them on easy ground. It is constantly increasing in cost. The eight hour day and the increase in wages have more than doubled the cost of logging operations in the last six years."

It will thus be seen that the character of the log (fir, hemlock or cedar), its grade (whether clear or otherwise), its length (influenced by breakage in rough country), and its size are considerations

which radically affect the logger's ability to load to the minimum, and consequently the determination as to what minimum is proper. It is equally true that the degree to which these considerations singly or in the aggregate affect the various log shippers is not accurately determinable. Moreover, the situation of any particular logger in this respect is changing from year to year, as he penetrates further into the timber. As logs generally are delivered in lots of from ten to thirty cars, and rarely ever in lots of less than five cars (Finding XI—Record p. 23), it would seem that a rule which permits the shipper to move all or the greater part of his timber without loss due to failure to make the minimum on each several car is both equitable and economically sound.

The allowance made for reduction of revenue due to change in the method of computing the minimum is attacked. Here again, the Department evinces its intent to preserve to the carriers a full fair return. Associated Log Shippers Exhibit No. 7 (Record p. 91 fol. 196a-13) shows that for the traffic included therein, the per cent of excess charges in the total freight bill is 6.12 per cent. This was the only calculation on this feature of the case, and no controverting figures were produced by the carriers. The record abounds with testimony of log shippers that they found it difficult and often impossible to load to existing minima. The existing minima, like log rates themselves, are lacking in uniformity and discriminatory. (Department's Ex. A. Record p. 73.)

This leaves the Department without any experience as to what the effect of uniform and non-discriminatory minima upon revenue would be. At the conclusion of the test period, the results of an equitable and lawful rule can readily be obtained. In naming rates calculated to produce annually six per cent additional revenue, to off-set the amount of reduction found due to change in minima, the Department has made an allowance to the carriers at least 50 per cent more favorable than strict adherence to the proof would require, since the exhibit covers a two-year period.

XIV.

Bunks.

The Department's Finding XXIII is as follows:

"In view of the fact that log flats, equipped with steel log bunks constitute safe, adequate and sufficient equipment for the prompt, safe and expeditious transportation of logs, we strongly recommend that the carriers, parties hereto, equip a reasonable number of log flats with steel bunks, the number so equipped bearing a proper relation to the volume of log traffic on the respective systems. The testimony shows that cars so equipped will permit of heavier loading, and hence yield a greater revenue to the carriers. The minimum load for cars not equipped with steel bunks should be 500 feet less than the minimum prescribed for cars so equipped and we will so order. The Department will direct that a rule be carried in the tariffs of the carriers whereby a lower charge will be made on cars not equipped with steel log bunks."

In attacking this finding, the carriers contend the evidence does not show that cars equipped with bunks will permit of heavier loading, and therefore yield a greater revenue to the carriers. The witness Frost (Stip. & Add. Record p. 81 fol. 1087) and the witness Dougherty (Record p. 876 fol. 986 *et seq.*) testified it was possible to load 500 to 700 feet additional on cars equipped with steel log bunks. The tariff prescribed reflects this difference in loading, and the carrier collects a greater charge and additional revenue from the bunk equipped car. The justness and fairness of this difference in charge as between ordinary flat car equipment and bunked equipment is attacked. The carrier testimony is conclusive of this. The witness Albee testified (Record p. 562) that approximately three-fourths of the Northern Pacific logging flats were equipped with bunks, detailed the advantages of such equipment (Record p. 585 fol. 464 *et seq.*) and stated (Record p. 588) it was impracticable to load logs without bunks. The witness Dow testifying for the Milwaukee, which road with the Northern Pacific carried in excess of 83% of the entire log traffic in 1920, stated (Record p. 367 fol. 93) that 50% of their cars were equipped with steel bunks, and that such equipment facilitated the unloading and safeguarded the car. The carriers are in the curious position of condemning a type of equipment which they are now extensively employing and which their witnesses approve. The elements of cost and danger to life and limb in the use of cars

not provided with bunks is discussed at some length by the witness Dougherty (Record p. 874 fol. 982 *et seq.*) (cf. also Dickson, Stip & Add. Record p. 157 fol. 1305; Irving, Stip. & Add. Record p. 138 fol. 1198; Richmond, Stip. & Add. Record p. 144 fol. 1282).

The finding *strongly recommended* the equipment of a *reasonable* number of log flats with steel bunks, upon the ground of their *safety* and *adequacy*. The carriers apparently attack the legality of this upon either ground. Passing the fact that the finding is a recommendation, and the further fact, as we have seen, that the carriers are already largely so equipped, we find the Department fully sustained by the statutes and decisions. If a bunk be considered a safety device (which it certainly is), Sec. 10402 Rem. Comp. Stat. (Wash.—1922) places it within the power of the regulatory body to order its installation. If, as is also the case, it constitutes adequate and sufficient equipment, it is within the power of the Department, under Secs. 10345 and 10400, Rem. Comp. Stat. (Wash.—1922) to order its attachment to log flats. Moreover, if the carrier does not furnish flat cars equipped to secure the load, the carrier is required by law to pay the shipper for furnishing such equipment. Secs. 10470, 10473, Rem. Comp. Stat. (Wash.—1922.) As relieving them from the duty of furnishing safe, adequate and sufficient equipment, relators rely upon the case of *United States v. Pennsylvania R. R. Co.*, 242 U. S. 208. In

that case the railroad published rates for the movement of oil in tank cars, but provided in connection with such rates that it would not undertake to furnish tank cars. The holding was that under the act to regulate commerce as it then existed, and in contemplation of the restriction on the "holding out" of the carrier (i. e. its refusal to undertake to furnish tank cars) there was no duty to provide such equipment. But it was expressly recognized that, *dehors* the statute, there was a common law duty to furnish equipment appropriate to the service which the carrier held itself out to render. No one can doubt that in the instant case, the carriers have held themselves out to the majority of the shippers as furnishing bunk equipment, and are in fact largely provided with such cars. Finally, the Federal law, which is the basis of the decision in the Pennsylvania case, has been changed by the provisions of the Transportation Act of 1920 (41 Stat. at L. 484, chap. 91), so that under the car service provisions of this enactment and particularly Par. 21, Sec. 1, carriers subject to the act may be required to provide "safe and adequate facilities."

The Supreme Court of Washington passed on this matter as follows (125 Wash. 584, 592):

"It is contended that the department erred in prescribing a penalizing lower rate for failure to furnish cars equipped with patent bunks. Section 9 of the public service law (ch. 117, Laws of 1911, pp. 546-547) provides as follows: 'Every common carrier shall construct, furnish, maintain and provide

safe, adequate and sufficient service facilities * * * and equipment to enable it to promptly, expeditiously, safely and properly receive, transport and deliver all persons or property offered to or received by it for transportation, and to promote the safety, health, comfort and convenience of its patrons, employees and the public. Rem. Comp. Stat., Section 10345.' We are satisfied that, under this provision, the board of public works was authorized to direct that the carrier provide the log bunks as part of the equipment to enable the carrier to promptly, expeditiously, safely and properly receive, transport and deliver the logs."

Here, again, the carrier assignments involve a question of state law. The construction put upon the statute by the highest court of the state, is binding upon this court under the authorities cited in this brief under division II of our argument. The references to the record disclose evidence ample to sustain the finding, and it is submitted that the same is reasonable and lawful.

XV.

Carrier Rate Comparisons Are Inapposite.

The carriers attempted comparisons between rates on logs and rates on other commodities moving in this state; they further attempted to compare rates on logs in this state with rates on logs in other states. The Department found these comparisons inapposite and set forth in its findings the peculiarities which differentiate the log traffic of Washington from other movements. Its finding XVII reads as follows:

"There is no commodity movement in the United States which is similar or analogous to the movement of logs in the Pacific Northwest. The log traffic in this state is large in volume and it is practically a continuous movement in trainload lots throughout the year. The lumber industry which utilizes logs as raw material, supplies the carriers with approximately 65 per cent of the outgoing traffic from this state. Due to the peculiar local conditions which surround the log traffic within this state, comparisons of log transportation rates in other states and decisions of tribunals involving log rates in such states are of little aid to us in this case. Neither is the log traffic fairly comparable with that of any other commodity transported within the State of Washington."

The carriers still rely on these inapposite comparisons despite the testimony of their own witnesses. The witness Mount, while introducing comparisons of rates in Eastern Tennessee (Record p. 469 fol. 263) denied he would consider those rates as being other than merely evidentiary, and that (Record p. 470 fol. 265) as a traffic man he would not feel disposed to putting any such rates in this territory at this time. The cross examination of this witness (Record p. 477 fol. 277 *et seq.*) indicates the defects in the attempted rate comparisons of the carriers. The witness Capron testified (Record p. 481 fol. 284) that he knew of no railroad that carried any more logs than the Northern Pacific. Volume of movement is a traffic consideration of importance.

XVI.

Plaintiffs in Error Adopted 1920 Operating Results as Fair to Them.

The brief submitted by Mr. Charles W. Bunn on behalf of plaintiffs in error, on pages 17 and 18, attacks the use of 1920 operating costs by the Department. The record will show the only complete annual statistics were those for 1920. Showings for fractional years prior and subsequent to 1920 are of little value because they do not truly represent the full cycle of a years' operation. Likewise, annual statements unaccompanied by the statistical data necessary to determine application intrastate and to the commodity involved, are of little value in this case. The witness Peterson testifying for the carriers stated (Record p. 745 fol. 743): "1921 is an exceptional year, and 1920 was fairly representative of logging traffic." The same witness later made this statement (Record p. 749 fol. 749): "I do not think that 1920 was an unfair year." The denial in the briefs of decline in labor and material costs since 1920 is remarkable in view of the carrier testimony on the subject. The witness Peterson, statistician for the Northern Pacific, testified concerning a wage reduction in 1921 which alone he estimated would reduce cost of operation 7%. (Record p. 728 fol. 713.) Testimony of V. P. Turnburke, statistician for the Great Northern, shows estimates of reductions in labor and material costs. (Record p. 778 *et seq.*) Further refer-

ence in support of the Department's finding of decline in labor and material costs is unnecessary since the announcement of the decision of the Interstate Commerce Commission in Reduced Rates, 1922, 68 I. C. C. 676. After commenting on these reductions in the cost of railroad operation in 1921, the Commission says (p. 731): "The tendency is toward increased revenues, lowered costs, and higher net income for the carriers."

Mr. Bunn makes further critical comment of the Department's observation concerning the empty car movement in 1920 due to bringing cars back from foreign lines after Federal control. He states this finding is erroneous because, as he believes, the carriers' cost figures were confined to operation of the Seattle and Tacoma divisions and contained no charges for bringing home empty cars from foreign lines. Mr. Bunn did not hear the proof and has misconceived its import. The carrier cost method, as explained by the witness Peterson for the Northern Pacific, was to take a figure claimed to represent the average cost of moving all freight on the Seattle and Tacoma divisions (Record p. 535 fol. 379) and then increase this cost with special costs claimed to be incurred solely in the log traffic, and without any consideration of the many cost reducing features of the log traffic. It will not be denied that the carriers here involved reclaimed their cars off line at the termination of Federal control, and that such movement was accomplished to Pacific Northwest termi-

nals over the very divisions for which cost figures have been presented by the carriers. The carriers serving the Pacific Northwest were particularly active in this return of cars because of the necessities of the eastbound lumber traffic.

The fact of this abnormal movement of returning empty cars is one so notorious as to be within the knowledge of the generality of mankind, and therefore a fact which can be properly judicially noticed. Railroad authorities have repeatedly emphasized this feature of 1920 operations. Mr. Julius Kruttschnitt, Chairman of the Board of the Southern Pacific Company, states in Bulletin 4 of "The Railroad Inquiry," a publication of the Association of Railway Executives:

"The empty car movement in 1920 was 76,136,000 car-miles greater than in 1918, and 709,649,000 car-miles greater than in 1919.

"It will be recalled that the faulty car distribution at the end of Federal Control was so great that the Interstate Commerce Commission was forced to order the conditions to be remedied by directing the carriers to shift the grain cars from the east to the grain fields, and the coal cars to the coal fields from points of delivery where they were scattered throughout the country, and that this service had to be rendered by the carriers regardless of expense.

"The extent to which cars had been sent away from home lines by the Railroad Administration during Federal Control, and the extent of the work which has been done in restoring them to home lines is shown by the following:

"At the beginning of Federal Control, January 1, 1918, cars away from home lines, 56 per cent.

"At the end of Federal Control, March 1, 1920, 78.1 per cent. January 1, 1921, 54.8 per cent. April 1, 1921, 29.4 per cent."

XVII.

THE CHARACTERISTICS OF LOG TRAFFIC PECULIARLY FAVORABLE FROM A TRANSPORTATION STANDPOINT, AND AS FOUND BY THE DEPARTMENT, ARE FULLY SUPPORTED BY THE RECORD.

Mr. Dudley, in his brief on behalf of plaintiff in error, Chicago, Milwaukee & St. Paul Railway Company (p. 92 *et seq.*), regards findings X and XI of the Department as assumption or contrary to the record, so it will be helpful to annotate these findings to the record. Many of these matters have already been dealt with in our brief (IV p. 30 *et seq.*, V p. 33 *et seq.*). Those not already discussed will be treated here.

Facts of climate and topography as found by the Department, are denied by Mr. Dudley; counsel pits his opinion against the findings of the regulatory body as contained in its order sustained by both the Superior and Supreme Courts of the state. The determination of such matters are peculiarly within the province of administrative officers, and so considered by the courts. This court in *Interstate Commerce Commission v. Baird,* 194 U. S. 25, 44, made this observation with respect to the Federal regulatory body:

"The inquiry of a board of the character of the Interstate Commerce Commission should not be too

narrowly constrained by technical rules as to the admissibility of proof. Its function is largely one of investigation and it should not be hampered in making inquiry pertaining to interstate commerce by those narrow rules which prevail in trials at common law where a strict correspondence is required between allegation and proof."

The fact that prevailing grades favor the log traffic cannot be denied, and we do not believe that Mr. Dudley would wish to be understood as denying this fact. The Northern Pacific, Great Northern and Milwaukee in their progress toward the Coast, all cross the main ridge of the Cascade Mountains in tunnels, and then follow respectively the courses of the Green, Skykomish and Cedar Rivers to Puget Sound. Running down the valleys of tributary streams and joining these main lines are certain branch lines of these carriers. But the logging roads proper connected with the common carriers are constructed, owned and operated by log shippers, exceed in number the common carrier branch lines, and encounter the adverse grades referred to by Mr. Dudley.

The same brief challenges the statement of the findings that "logs generally are delivered in lots of from ten to thirty cars, and rarely ever in lots of less than five cars, thus constituting a very desirable form of traffic." The witness Dougherty of the McNeill-O'Hearne Logging Co., testified (Record p. 871 fol. 977) that the normal output of a camp operating one side is about ten cars per day. The witness Frost, vice-president and general manager of the Wallace

Falls Timber Co., testified (Stip. & Add. Record p. 8
fol. 1091) that he thought there were very few singl
car shipments of logs; that if any one were loggin
at all, he would usually have one side at work whic
would mean from five to ten or fifteen cars. A
examination of the Department's Exhibit C, showin
the actual log movement on the lines of all the car
riers involved for the year 1920, demonstrates th
correctness of the foregoing testimony given by prac
tical loggers. The witness Nicholson, general man
ager of the Milwaukee, constructed what he termed
typical log operation on the basis of a 20-car dail
shipment (Record p. 408 fol. 161). Surely no train
load rates would be named if the movement wa
commonly in less than lots of 10 to 30 cars. Further
testimony on this subject by the witness Nicholson
will be found in the record, p. 414 *et seq.* Witnes
Guild of the Oregon-Washington testified (Record
p. 449 fol. 232) that in March, 1921, an average month
the O.-W. R. & N. handled 1,500 cars of logs, which
is practically 50 cars per day, and most of the traffic
was on the branch between Centralia and Aberdeen
including the North River branch (Record p. 438
et seq.).

Mr. Dudley misunderstands the record in this
connection, for he states in his brief (p. 94): "De-
partment's Exhibit D (Record f. 195) shows that
41.21% of the entire log movement in 1920 was in
single car lots." This is incorrect. The carriers now
publish, in addition to their single car rates, the fol-

lowing trainload rates (Department's Ex. A—Record p. 73):

NORTHERN PACIFIC.

45 rates for trainloads of 10 or more cars
3 " " " " 15 " " "
5 " " " " 20 " " "

MILWAUKEE.

16 rates for trainloads of 10 or more cars
11 " " " " 15 " " "
5 " " " " 20 " " "
2 " " " " 30 " " "

O.-W. R. & N.

5 rates for trainloads of 10 or more cars
6 " " " " 15 " " "

Department's Ex. D (Record p. 73 fol. 195) shows the cars and revenue which resulted from *trainload* movement where such a rate was available during the period covered. The same exhibit shows the *number of cars moved on single car rates,* many of which so moved because the shipper could not offer at one time sufficient cars to constitute the required trainload or because no trainload rate was named for the distance. It is manifestly erroneous to assume, especially in view of the testimony of Milwaukee witnesses that anything like 41.21% of the entire log movement in 1920 was in *single car lots.*

Mr. Dudley is again in error when he denies (p. 94) there was "any testimony as to the difference in cost between handling logs in single car lots and

in trainloads." Mr. Nicholson of the Milwau testified as follows (Record p. 420):

"Where there would be an operation that wo produce thirty cars for a train the expense would less. We have with our larger logging operati usually to deal with a logging railroad that gath their logs out in the timber and delivers them to in lots of twenty to twenty-five or thirty cars, n where such deliveries are made the expense of gath ing them up with our crew is not as great as picki them up a few cars at a time."

Further answering the same brief, it is sa (pp. 94, 95) that there is not a scintilla of eviden supporting the finding that the carriers are able keep their logging equipment more profitably e ployed than is the equipment used in handling oth commodities. Confining the matter to Milwauk testimony for the sake of brevity, the witness D testified (Record p. 363 fol. 86) that the avera daily movement of box or flat cars, other than loggi cars, was about 10 miles per day, and stated that logging car is run for about 30 miles per day, a when business is good, on some divisions they r about 100 miles per day, but in the loading territo the car mileage is always low. Average daily mov ment of cars is a very definite index of the profitab employment of equipment.

The Department's finding that log cars are und load a greater portion of the time than are oth classes of equipment having the same average leng of haul, is said in the brief of Mr. Dudley (pp. 94, 9

to be without a scintilla of evidence to support it. The descriptions of the manner in which the log traffic is handled demonstrate the correctness of the finding. The testimony of the witness Frost (Stip. & Add. Record p. 61 *et seq.*) representing the loggers, as to the manner in which the log traffic is handled is especially pertinent. From this the court will have a picture of the logging traffic, showing the quantity production required by the logging companies to operate economically. It is essential that they ship logs in lots of at least ten cars per day. If lots of lesser number are shipped, the expense becomes greater. Therefore because of competitive conditions, practically all loggers are required to do business on a basis of quantity production. Ten cars are loaded in the woods, frequently upon the rails of the logging companies themselves, and transported on this logging road to the point of connection with the common carrier where they are taken over intact, coupled together, inspected, and all that it is necessary for the train crew of the common carrier to do is to attach this solid lot of ten or more cars to the train, and go on to the destination of the logs. At the destination the logs usually are unloaded immediately, and dumped on a spillway into a log pond or into tide water, whereupon the cars are then ready to be inspected and returned to the logging company. Any delay occurring at the terminal surely can be laid to the common carrier, and not to the logging company. Unlike other classes of freight, an unloading period

of 48 hours is not necessary. It was testified by the witness Dow (Record p. 372 fol. 103) that all that is required for unloading 10 cars is 40 minutes. Surely there is hardly any comparable traffic where the loads can be taken from ten cars in 40 minutes, and the equipment released to the carrier. Upon the return of equipment by the common carrier to the point of connection with the logging company, the cars are set out intact on the spur track, picked up by the logging road and taken into the woods. In that sense there is no spotting operation such as is necessary for the loading of grain, and in the grain shipping centers where the box cars are spotted here and there on each siding for the purpose of loading. In view of these facts abundantly supported by the record there can be no doubt about the accuracy of the Department's finding.

To check up and answer by annotation to the record all the assertions made in the carrier briefs charging lack of support in the record for the findings made would require extending this brief to undue length. We do not believe it is required under the decisions of this court, especially in a case where carriers have twice been afforded a complete review below.

XVIII.

The Wallace Falls Case.

The carriers place much reliance upon the decision in *Public Service Commission v. State ex rel. Great Northern Railway Co.*, 118 Wash. 629, 204

Pac. 791, 207 Pac. 688. The case is depended upon by the carriers in their briefs as deciding many of the matters involved in the instant case, so examination of what the case really did decide will be helpful. The case involved a single shipper, the Wallace Falls Timber Co., a single commodity, logs and a single movement, that from Gold Bar to Everett. The order of the Commission named *a single car, and not a trainload rate.* The rate named was applicable whether the equipment furnished was bunked or unbunked. The minimum applicable was left unchanged. In contradistinction, the instant case involves all shippers of logs within the State of Washington, and names a uniform distance scale for all movements of this commodity within the state. The order in the instant case was arrived at after an extended hearing covering every phase of log traffic within the state and comprehensive findings which define in detail the rate determining characteristics of that traffic as a whole. The holding in the Wallace Falls case was that with regard to an individual shipper, consideration of the particular circumstances surrounding his traffic was error. But the court specifically limits the application of its decision to such a special case. A portion of the decision reads as follows (p. 633):

"We are satisfied that, in reaching its conclusions, the commission erroneously considered certain conditions found by it to exist, such as that the timber company furnished trainloads of logs, did not require switching, furnished extra help in unloading the cars,

and at its own expense constructed steel bunks on t
cars furnished by the respondent * * *. (p. 635

"We do not mean to hold that under no circu
stances should the commission, in fixing rates, or t
transportation company in fixing schedules, consid
and be influenced by things done by the shipper whi
would reduce the cost of transportation. Beyo
question, such conditions will arise. But they shou
be of such importance as to at once distinguish suc
shippers from others. They should be individual ac
of material consequence, and not numerous acts eac
of small significance. Any other rule would seem t
make the public service act cumbersome and unwork
able. We realize that the statute invests the commi
sion (now department) with broad powers and tha
the courts should be slow to interfere with its de
cisions, but we are also forced to the conclusion tha
the logic of the decision which we are reviewing woul
lead to such complications as would ultimately de
stroy the virtues of the public service act. * * *

The cause was remanded to the department fo
reconsideration, and, if thought best, the taking o
additional testimony. We have no doubt the cou
had in mind, as indicated by the language quote
above, the distinction between individual and genera
rate cases, and therefore expressly limited the doc
trine of the Wallace Falls case to the first sort. Wit
regard to the remarks on trainload rates contained i
the opinion, the practice condemned by authority i
the co-existence of single car and trainload rates i
the same territory, the latter upon a lower level tha
the former. This is the very discrimination no
widely practiced in this territory by appellants i
error (Department's Ex. A) and which the Depar
ment is seeking to remove by its uniform scale.

The Wallace Falls case was decided by the Supreme Court of Washington, February 23, 1922; the case at bar was decided by the same court July 18, 1923. The former case was urged upon the court in argument of the latter. It is quite apparent that the two cases are differently circumstanced and that therefore the Supreme Court of Washington did not consider the Wallace Falls case as decisive of any issues in the case at bar.

XIX.

Carrier Traffic Comparisons Are Contrary to the Actual Situation as Disclosed by Proper Comparisons.

At the very root of the carrier calculations is a premise which we might almost say is condemned by its mere statement. The premise, stated in varying forms throughout the briefs of plaintiffs in error, is this: the volume of traffic per mile on the line of each of the carriers in the State of Washington is less than the volume of traffic per mile on each of the systems. With the knowledge that Washington contains the western terminals of the carriers involved, that these terminals and the lines of the carriers generally within the state assemble and forward the eastbound lumber shipments which constitute the bulk of the eastbound movement, and that these same railroads through the ports of the state handle the transcontinental import and export traffic, a layman would challenge this premise on good ground. When it is

further considered that the average figures for t
system, if correctly compiled, must reflect the l
traffic density of states which originate little traf
intermediate between the terminals, it amounts to
demonstration of the fallacy of the premise.

As an example of this erroneous premise, let
take the figures shown on page 60 of the brief su
mitted on behalf of the Northern Pacific, Gre
Northern and Oregon-Washington. The carrier ta
ulation is as follows:

"*Great Northern:*

Ton Miles revenue freight per mile of road—
System 1,042,152
State 677,463

Northern Pacific:

Ton Miles revenue freight per mile of road—
System 1,180,283
State 845,830

Chicago, Milwaukee & St. Paul:

Ton Miles revenue freight per mile of road—
System 1,071,629
State 682,249

Oregon-Washington Railroad & Navigation:

Ton Miles revenue freight per mile of road—
System 834,132
State ..... 434,878"

Before comparing figures truly representative o
the relation of traffic density in the State of Wash
ington and on the systems of the carriers with th
misleading tabulation and the erroneous conclusion
drawn therefrom, let us analyze the carrier compu

tation. The unit adopted is the ton mile. A ton mile, as the term implies, is one ton moved one mile. The unit comprises *volume* and *movement*. The total number of these units moved in the state or on the system, as the case may be, is then divided by the miles of road state or system respectively. This results in a figure which is arbitrary and valueless from the standpoint of rate determination. The miles of road in the state or on the system have no proper connection with *traffic density* as the carriers seek to use it; *traffic density* properly conceived, is *volume* passing a certain point. *Traffic density* in this sense, is the quantity or tonnage of freight hauled through a representative point or points, irrespective of whether the several tons passing are moving on a road 100 miles long or 1,000 miles long.

An illustration from another field will make our meaning clear. Let us consider the case of the measurement of water passing over a dam. The volume is expressed in second feet, i. e., the number of cubic feet of water passing each second of time. The length of the stream above the dam and below, has nothing whatever to do with the volume. So here, the measure of traffic volume is the number of tons passing in one year. This is the true measure of traffic density and the total ton miles divided by the length of the road, state or system, is meaningless and misleading in this connection.

We do not mean to say that the ton mile unit (not gross ton miles divided by the length of the road) has

no office in railroad accounting. One of its uses
to measure and relate expense and revenue. T
mile expense and ton mile revenue are figures mo
easily handled than the aggregate figures unreduc
to units, and when not employed on arbitrary bas
are indicative of operating ratio. Ton mile statist
without more, are not alone to be taken as the s
test of revenue and expense.

We now set opposite the carrier tabulation, fr
which it is erroneously concluded "that the traf
density in the State of Washington is only a lit
more than half that on the system of any of the c
riers," figures also taken from the 1920 annual
ports of the carriers and demonstrating the true re
tion. In our tabulation we start with the aggrega
tons revenue freight state and system, and then divi
each by the state and system mileage respective
Referring now to the numbered items of the pag
of the record shown below, the calculation in ea
case is the division of item 81 by item 1. The resu
are as follows:

CARRIERS' TABLE.

	1 Tons Miles of Rev. Frt.	2 Tons of Rev. Frt.
Great Northern Ry.		
System	1,042,152	4,031
State	677,463	4,224
(Record—fol. 452-456.)		
Northern Pacific Ry.		
System	1,180,283	3,524
State	845,830	5,947
(Record—fol. 287-289; 279-286.)		
Chicago, Milwaukee & St. Paul		
System	1,071,629	4,240
State	682,249	6,028
(Record—fol. 364; 365-368.)		
Oregon-Washington R. R. & Nav.		
System	834,132	3,473
State	434,878	4,098
(Record—fol. 509; 510-512.)		
Combined Systems		
System	1,069,979	3,944
State	690,447	5,196

The obvious conclusion from the figures shown above in column 2 is that the average volume of tonnage on the line of each of the carriers within the State of Washington considerably exceeds the average volume of tonnage on the several systems. The combined figures show the same result, i. e., the average units of tonnage volume in the State of Washington exceed the average units of tonnage volume for the four systems by 1,252.

By using the carrier figures it would probably be possible to make a calculation claimed to demonstrate that logs, and every other commodity for that matter as the necessity of the case required, were handled at a loss within the State of Washington. Further, the same inapt comparison can be used in a rate hearing in any state through which the carrier operates to show that there, too, intrastate commodities are carried at a loss. Such is the fantastic result obtained by the attempted comparison of things incomparable.

XX.

CONCLUSION.

The case at bar is an attempt to re-try before this court a cause which was adequately heard below under state law and procedure affording complete due process. Coupled with this is a plea that this court *legislatively* declare Tariff 29 reasonable; necessarily so, for Tariff 29 was filed after the conclusion of the hearing and there is nothing in the record to indicate what revenue it was intended to yield. It was properly held unreasonable when the Department determined that its scale would afford a fair return. The attempt of the Department to secure the removal of long standing and widespread discrimination prior to hearing and upon carrier initiative, is an earnest of fair dealing with the plaintiffs in error. The findings of the Department, said in the carrier briefs to be unsupported by the evidence or contrary thereto, will be found from an examination of the portions of the record hereinbefore cited to be in large part supported by testimony of carrier witnesses without more.

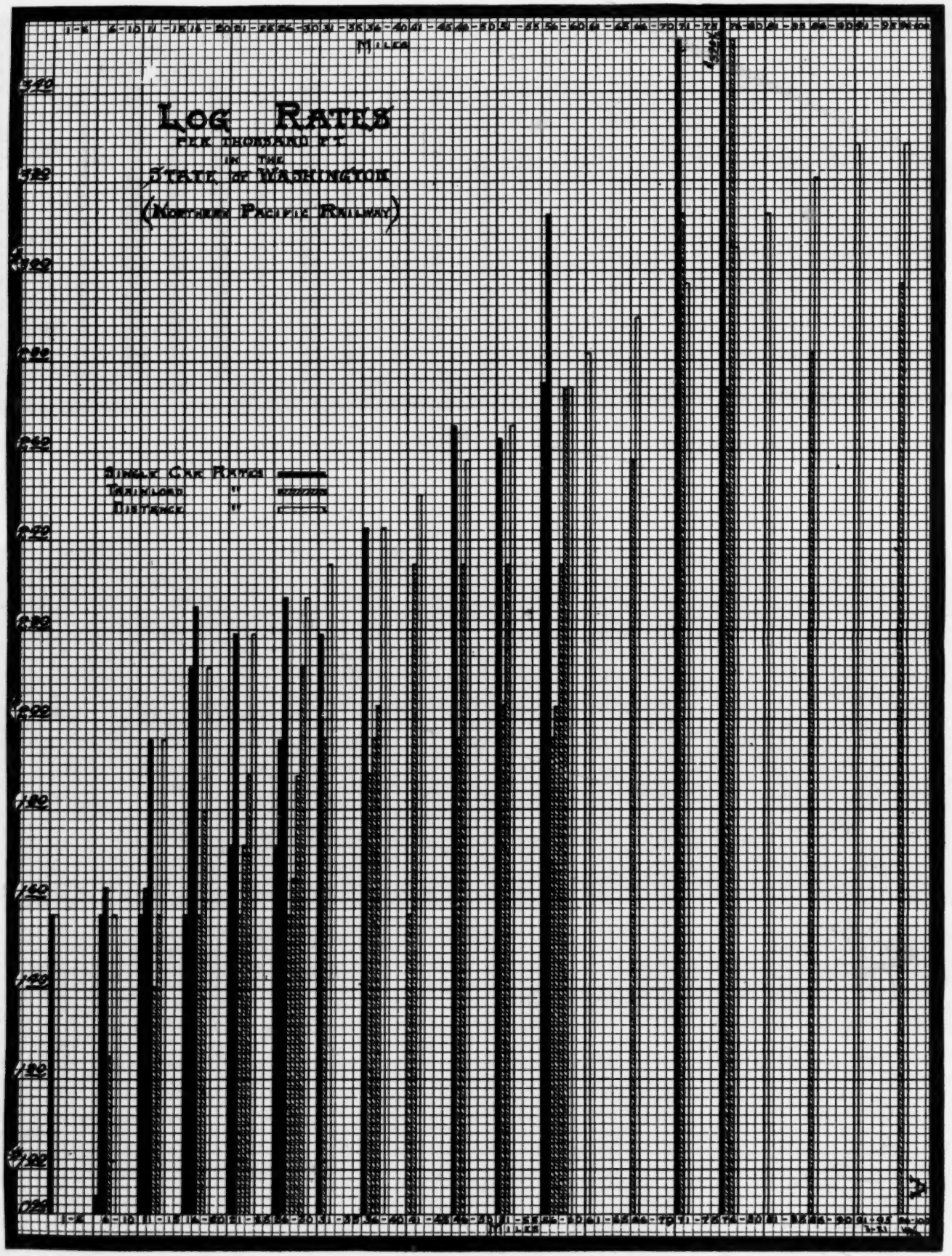
The judgment of the Supreme Court of Washington herein should be in all respects affirmed.

Respectfully submitted,

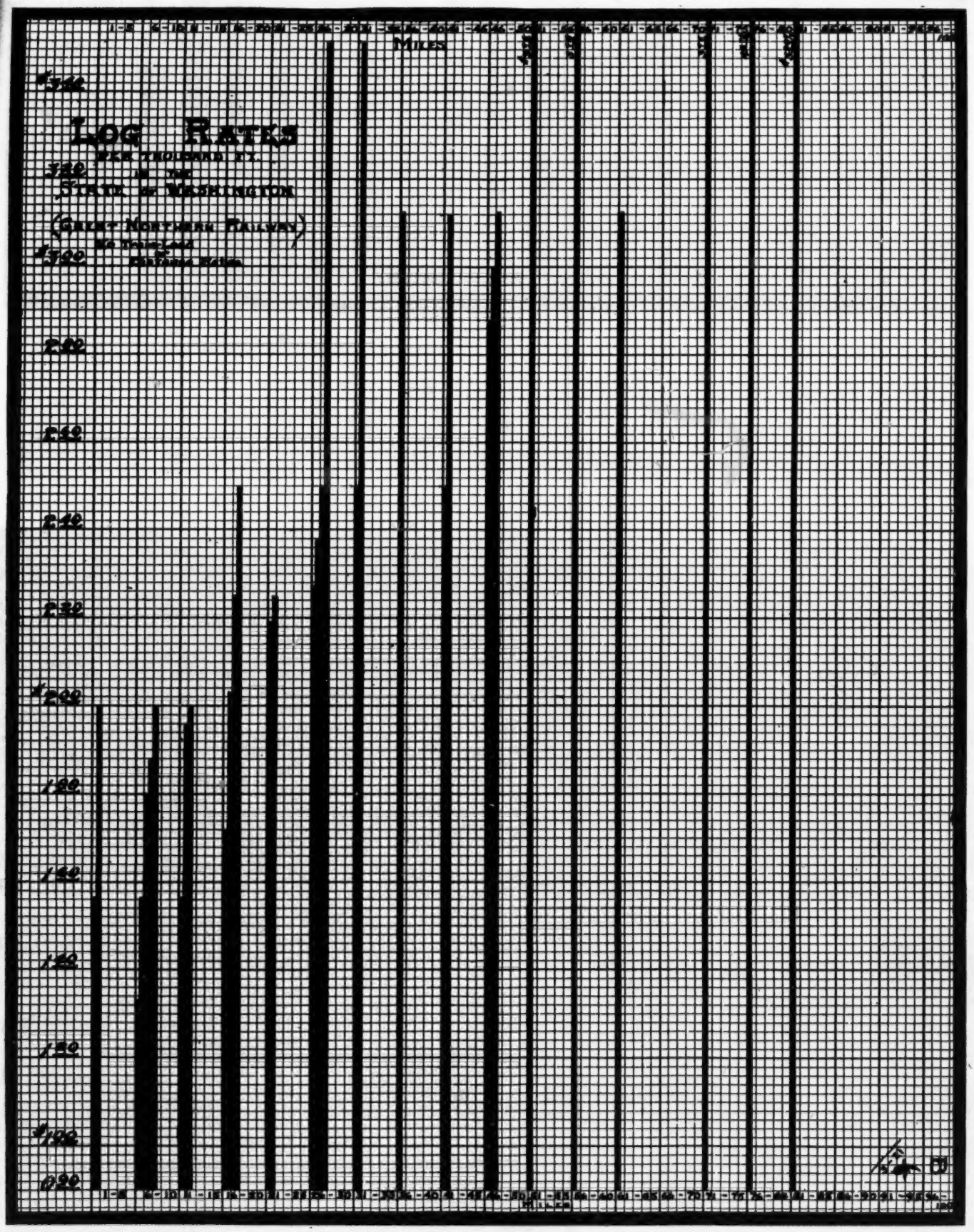
JOHN H. DUNBAR,
Attorney General of the State of Washington,

RAYMOND W. CLIFFORD,

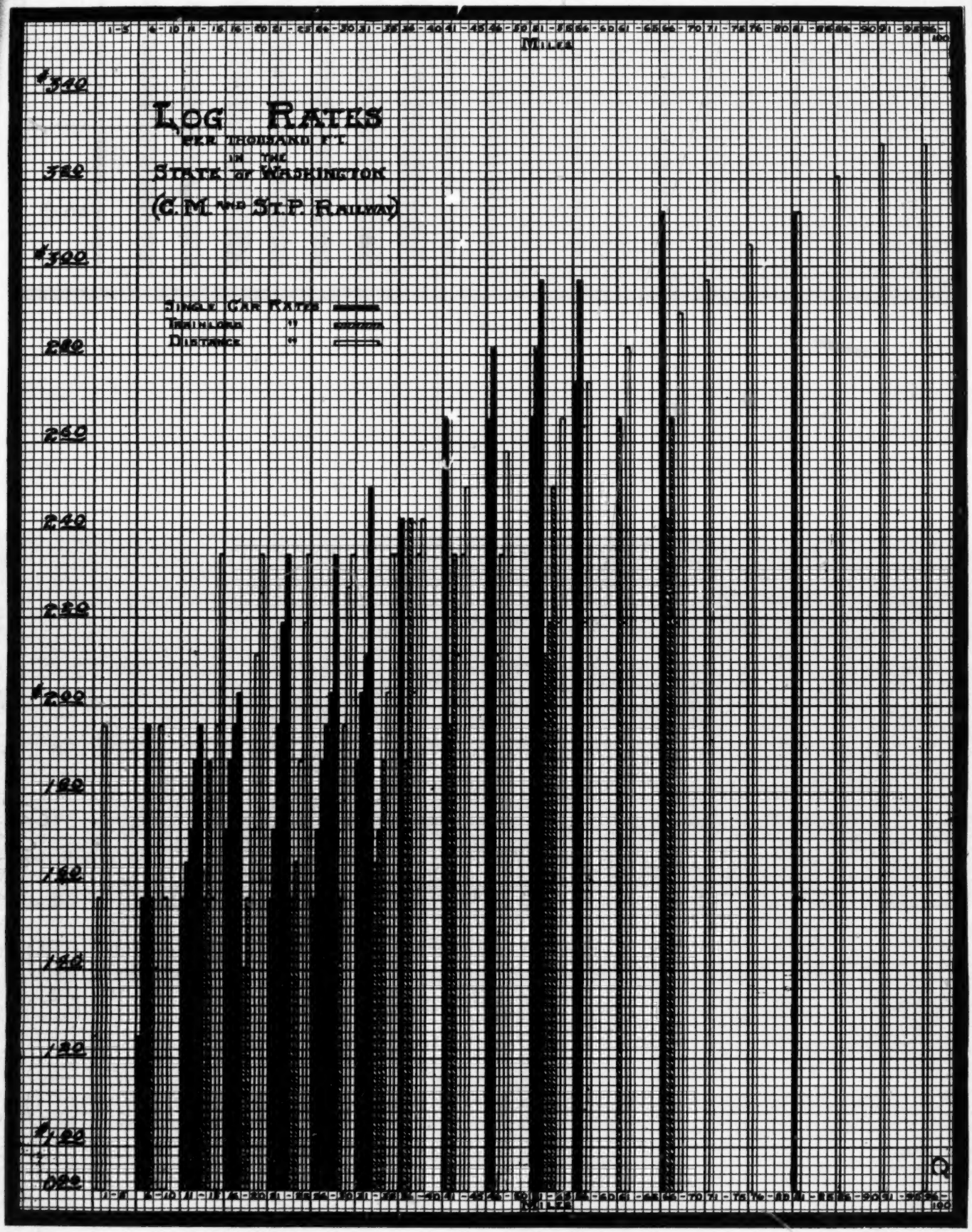
STEPHEN V. CAREY,
Attorneys for Defendants in Error.


Miles
Log Rates
Per thousand ft.
in the
State of Washington
(Northern Pacific Railway)
Single Car Rates
Trainload "
Distance "
Miles

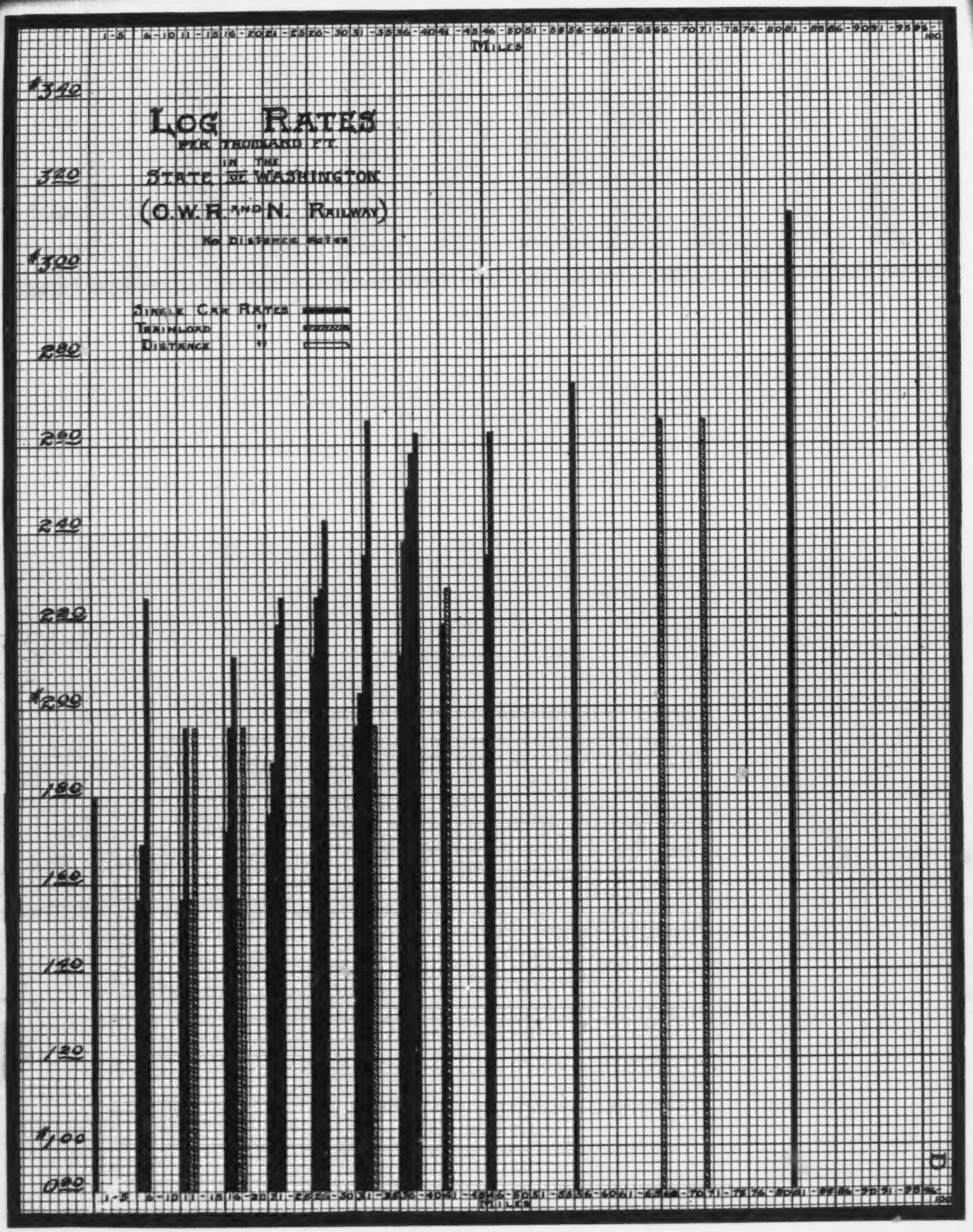
Appendix A


LOG RATES
PER THOUSAND FT.
IN THE
STATE OF WASHINGTON
(GREAT NORTHERN RAILWAY)
MILES

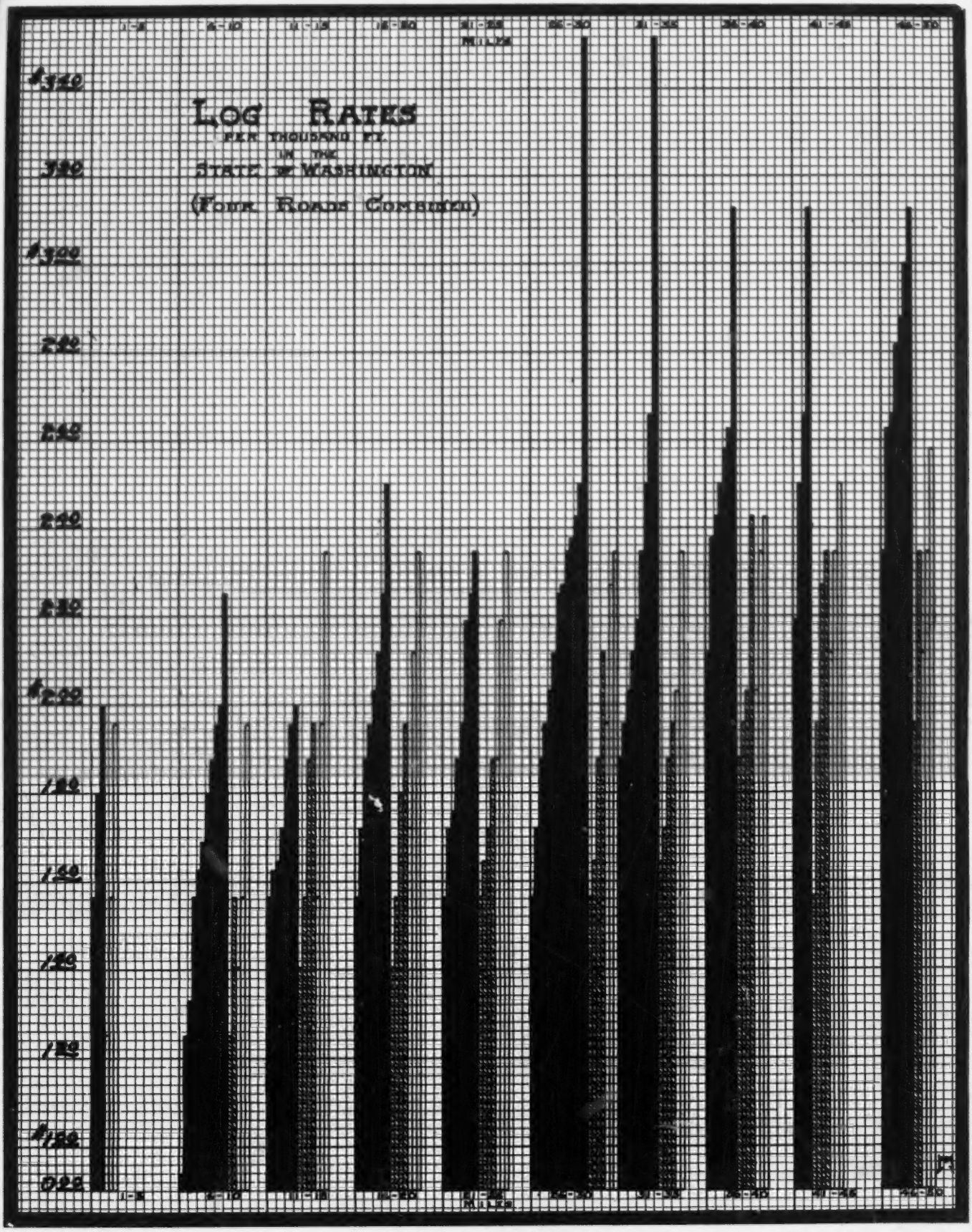
Appendix B


Miles
$3.00
LOG RATES
PER THOUSAND FT.
IN THE
STATE OF WASHINGTON
(C.M. AND St.P. RAILWAY)
$3.00
SINGLE CAR RATES
TRAIN LOAD "
DISTANCE "
2.00
2.00
2.00
$2.00
1.00
1.00
1.00
$1.00
.00
Miles

Appendix C


Miles
$3.40
3.20
$3.00
2.80
2.60
2.40
2.20
$2.00
1.80
1.60
1.40
1.20
$1.00
0.80
LOG RATES
PER THOUSAND FT.
IN THE
STATE OF WASHINGTON
(O.W.R. & N. RAILWAY)
No Distance Rates
SINGLE CAR RATES
TRAINLOAD "
DISTANCE "

Appendix D


LOG RATES
PER THOUSAND FT.
IN THE
STATE OF WASHINGTON
(FOUR ROADS COMBINED)

Appendix E

APPENDIX F.

Before the Department of Public Works of Washington.

THE DEPARTMENT OF PUBLIC WORKS OF WASHINGTON,
Complainant,
vs.
GREAT NORTHERN RAILWAY COMPANY; NORTHERN PACIFIC RAILWAY COMPANY; CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY; SPOKANE, PORTLAND & SEATTLE RAILWAY COMPANY; OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY; INLAND EMPIRE RAILWAY COMPANY; SPOKANE & EASTERN RAILWAY & POWER COMPANY; COWLITZ, CHEHALIS & CASCADE RAILWAY COMPANY; HARTFORD & EASTERN RAILWAL COMPANY; NEWAUKUM VALLEY RAILWAY COMPANY; PORT TOWNSEND & PUGET SOUND RAILWAY COMPANY; PUGET SOUND & CASCADE RAILWAY COMPANY; STAR LOGGING RAILWAY COMPANY; WASHINGTON, IDAHO & MONTANA RAILWAY COMPANY; WASHINGTON WESTERN RAILWAY COMPANY; WATERVILLE RAILWAY COMPANY; NORTH COAST POWER COMPANY; PACIFIC NORTHWEST TRACTION COMPANY; PUGET SOUND INTERNATIONAL RAILWAY COMPANY; WALLA WALLA VALLEY RAILWAY COMPANY; YAKIMA VALLEY TRANSPORTATION COMPANY; MARYSVILLE & ARLINGTON RAILWAY COMPANY; PACIFIC COAST RAILROAD COMPANY; CAMAS PRAIRIE RAILROAD COMPANY; SPOKANE-INTERNATIONAL RAILWAY COMPANY; PUGET SOUND ELECTRIC RAILWAY; AND SEATTLE & RAINIER VALLEY RAILWAY COMPANY.
Respondents.

No. 5401

FINDINGS OF FACT and ORDER.

This matter came on regularly for hearing before the Department of Public Works of Washington, at its offices in Olympia, Washington, June 21, 1922, at 1:30 p. m., upon complaint of the said Department of its own motion and pursuant to notice duly given before Director E. V. Kuykendall, the Department being represented by Raymond W. Clifford, Assistant Attorney General; O. O. Calderhead, Traffic Expert, and H. O. Berger, Assistant Traffic Expert.

The respondents were represented by the following:

Great Northern Railway Company by Thomas Balmer;

Northern Pacific Railway Company by L. B. daPonte;

Chicago, Milwaukee & St. Paul Ry. Co. by F. M. Dudley;

Spokane, Portland & Seattle Ry. Co. by L. B. daPonte;

Oregon-Washington Ry. & Nav. Co. by W. A. Robbins;

Inland Empire Railway Company by L. B. daPonte;

Spokane & Eastern Ry. & Power Co. by L. B. daPonte;

Newaukum Valley Railway Company by T. C. Frew;

Puget Sound & Cascade Ry. Company by W. H. Somers;

Washington Western Ry. Company by C. G. Saunders;

Waterville Railway Company by R. C. Brenmisholtz;

Pacific Northwest Traction Company by W. H. Somers;

Puget Sound International Ry. Company by W. H. Somers;

Walla Walla Valley Railway Company by L. B. daPonte;

Yakima Valley Transportation Company by W. A. Robbins;

Pacific Coast Railroad Company by G. W. Mertens;
Camas Prairie Railroad Company by L. B. daPonte;
Spokane International Railway Company by S. J. Henry;
Puget Sound Electric Railway by W. H. Somers;
Seattle & Rainier Valley Ry. Company by R. M. Burgunder.

PRELIMINARY RECITAL.

The complaint filed herein did not include the following named carriers: Pacific Coast Railroad Company; Camas Prairie Railroad Company; Spokane International Railway Company; Puget Sound Electric Railway and Seattle and Rainier Valley Railway Company. Representatives for these carriers were present at the hearing, and being asked if there was objection to their being joined as parties respondent, consented to such joinder and it was so ordered.

Witnesses were sworn and examined, testimony and exhibits introduced, and the Department being fully advised, makes the following findings of Fact and Order:

HISTORY.

The existing freight rates for interstate movement in this territory and for intrastate movement within the State of Washington, are the result of two successive increases of 25 per cent on the rates which were in effect on June 24, 1918. During the period of Federal Control, the Director General of Railroads issued his General Order No. 28, which became effective on June 25, 1918, and by this order all rates, both state and interstate, were increased 25 per cent, with the exception of rates upon certain specifically named commodities which were increased in specific amounts, and also a maximum increase upon lumber and grain and other commodities. As a result of the maximum increase on lumber and grain and other commodities, the rates for many intra-

state movements were increased by greater percentages than on shipments moving interstate where such interstate rates were in excess of 20c and 24c per one hundred pounds, respectively.

Subsequently Congress passed the Transportation Act of 1920, approved February 28, 1920, and in accordance with the requirements of this Act, the Interstate Commerce Commission, effective August 26, 1920, entered an order in its proceeding entitled "Increased Rates, 1920," and numbered Ex Parte 74, 58, I. C. C. 220, 469, and "Authority to Increase Rates," 58 I. C. C. 302, by which all interstate rates in this territory were again increased by 25 per cent. The Public Service Commission of Washington, now the Department of Public Works in its proceeding No. 5092, entitled "In re Application of Northern Pacific Railway Company et al., for increases in rates in the State of Washington," entered its order by which all intrastate rates within the State of Washington were increased 25 per cent, thereby bringing the intrastate rates as a whole to a level with that established on interstate rates by the Interstate Commerce Commission in its order in Ex Parte 74, referred to above.

The Interstate Commerce Commission in docket No. 13293, "Reduced Rates, 1922," 68 I. C. C. 676, submitted March 15, 1922, decided May 16, 1922, entered its opinion in which it found and determined that after considering all the facts of record, including the necessity of reasonable expenditures for additions and betterments, that the existing interstate freight rates and charges, including charges for switching and other accessorial service, and all other charges applicable to freight service which were increased by authority of Ex Parte 74 will be, on and after July 1, 1922, unjust and unreasonable to the extent that they may respectively include more than 12½ per cent of increase over the rates in effect immediately prior to August 26, 1920, in the Mountain Pacific Group. The Mountain Pacific Group includes all

of the Pacific Coast States and more particularly the State of Washington.

No written pleadings addressed to the complaint herein were filed, but the respondents made such admissions and denials as appear from the transcript of testimony herein. The representatives of respondents stated their attitude toward rate reduction, interstate and intrastate, with varying degrees of certainty. In the case of many, and particularly the largest carriers, such indications of intention to reduce rates were subject to qualification and reservation, and knowledge of carrier executive authority directing such decreases was denied, and just what decreases were being contemplated were declared unknown; however, the purpose of the carriers was stated to be that whatever rates interstate were reduced, corresponding reductions would be made in rates applying on state traffic by all carriers.

After considering all of the facts of record, including the report of the Interstate Commerce Commission in Docket No. 13293, "Reduced Rates, 1922," 68 I. C. C. 676, we make the following findings:

FINDINGS OF FACT.

I.

That, except as hereinafter provided, all intrasta freight rates and charges, including charges for swite ing and other accessorial service, and all other charg applicable to intrastate freight service in this state wi on and after July 1, 1922, subject persons (shipper and localities in intrastate commerce of the aforesa state to undue and unreasonable prejudice, disadva tage and discrimination to the extent to which intersta rates will be reduced on that date, unless correspondi reductions are made applicable to intrastate traffic.

II.

That the existing intrastate freight rates a charges enumerated above, will, on and after July 1922, subject the intrastate commerce of the aforesa state as a whole to undue, unreasonable and unjust d crimination, unless such intrastate freight rates a charges are reduced in harmony with correspondi rates on interstate traffic.

III.

That all intrastate freight rates within the State Washington exceeding 12½ per cent over and above t rates in effect on August 25, 1920, will be, on and aft July 1, 1922, unjust, unreasonable, discriminatory a more than sufficient unless reduced to the level esta lished by the Interstate Commerce Commission in I. C. Docket No. 13293, "Reduced Rates, 1922," 68 I. C. 676, as just and reasonable for interstate rates in t Mountain Pacific Group.

IV.

That just and reasonable intrastate freight rat within the State of Washington, on and after July 1922, will be rates not exceeding 12½ per cent over a

above the rates in effect on August 25, 1920. In applying the reductions prescribed herein to intrastate freight rates carriers shall be governed by the directions, instructions and exceptions set out by the Interstate Commerce Commission in Docket No. 13293, "Reduced Rates, 1922," treating the same as applicable to intrastate freight rates within the State of Washington.

V.

Consideration is given to the relation of the rates for the transportation of logs intrastate within the State of Washington to the general reduction ordered herein effective July 1, 1922, in findings of this date separate and apart from these findings and order.

VI.

If it is desired to depart from the general terms of this order in particular instances, application should and apart from these findings and order.
be made to this Department by proper petition setting forth the necessity for such departure.

ORDER.

WHEREFORE IT IS ORDERED that the respondents herein be, and they are hereby, notified and required to publish and file with this Department on one day's notice, on or before July 1, 1922, rates which will conform to the findings made herein.

WITNESS THE Department of Public Works of Washington, this 22nd day of June, 1922.

DEPARTMENT OF PUBLIC WORKS OF WASHINGTON.

By E. V. KUYKENDALL,
Director.
HANCE H. CLELAND,
Supervisor of Public Utilities.
FRANK R. SPINNING,
Supervisor of Transportation.

ATTEST: J. H. BROWN,
Secretary.

APPENDIX G.

Same entitlement as Appendix F.

No. 5401

FINDINGS OF FACT WITH SPECIAL REFERENCE TO RATES FOR THE TRANSPORTATION OF LOGS INTRASTATE WITHIN THE STATE OF WASHINGTON.

This Department having entered in this cause its general Findings of Fact and Order of this date respecting all intrastate freight rates within the State of Washington, wherein in Finding No. V it is stated that "Consideration is given to the relation of the rates for the transportation of logs, intrastate, within the State of Washington to the general reduction ordered herein, effective July 1, 1922, in findings of this date separate and apart from these findings of fact and order," and the Department being fully advised in the matter makes the following Findings of Fact:

I.

The rates for the transportation of logs within the State of Washington were fully considered by the Department in its Cause No. 5159, and the related proceeding, Cause No. 5330. These causes are now the subject of a writ of review in consolidated cases Nos. 8428-8429 in the Superior Court of the State of Washington for Thurston County.

II.

In the Findings of Fact and Order in consolidated causes Nos. 5159-5330, before this Department, rates for the transportation of logs, intrastate within the State of Washington, were determined as of the date of the order to yield a fair return upon the value of the railway property used in the transportation of logs. Our findings and order in consolidated causes Nos. 5159-5330

were made with knowledge of, and giving full force and effect to, the situation with regard to revenues, operating expenses and traffic conditions generally as shortly thereafter found by the Interstate Commerce Commission in docket No. 13293, "Reduced Rates, 1922," 68 I. C. C. 676. Should the outcome of the writ of review now being prosecuted against the Department's Findings of Fact and Order in consolidated causes Nos. 5159-5330, be an affirmance in all respects of such Findings of Fact and Order, and the rates therein named become effective accordingly, such rates will yield their just and fair proportionate share of the aggregate revenue contemplated by the Interstate Commerce Commission in Docket No. 13293, and the instant case.

III.

It is not the purpose of the Department to take mandatory action with respect to the existing log rates within the State of Washington, while same are the subject of a writ of review in the State Court, but in view of the decision of the United States Supreme Court in Railroad Commission of Wisconsin et al., vs. C. B. & Q. Railroad Company, reported in Vol. 10, U. S. Supreme Court Advance Opinion 1921-22, page 236, it is apparent that if the existing log rates within the State of Washington are not reduced by an amount in conformity with the findings and order in causes Nos. 5159-5330, consolidated, effective July 1, 1922, discrimination will exist against the log traffic and the shippers of logs intrastate within the State of Washington and in favor of all other intrastate traffic and all interstate traffic and shippers thereof.

IV.

These findings will apply only to the carriers which were involved in consolidated Causes Nos. 5159-5330, namely: Chicago, Milwaukee & St. Paul Railway Company; Great Northern Railway Company; Northern

Pacific Railway Company; the Oregon-Washington Railroad & Navigation Company, and Spokane-International Railway Company and all other carriers operating within the State of Washington will be required by order to publish and file on one day's notice, effective July 1, 1922, rates for the transportation of logs within the State of Washington, not exceeding 12½ per cent over and above the rates in effect on August 25, 1920. In applying the reductions prescribed to intrastate freight rates, carriers shall be governed by Finding IV of our Findings of Fact and Order in this cause, covering intrastate freight rates within the State of Washington in general.

ORDER.

WHEREFORE IT IS ORDERED, that all of the respondents except the Chicago, Milwaukee & St. Paul Railway Company; Great Northern Railway Company; Northern Pacific Railway Company; Oregon-Washington Railroad & Navigation Company and the Spokane-International Railway Company be, and they are hereby, notified and required to publish and file with this Department on one day's notice, on or before July 1, 1922, rates which will conform to the findings made herein.

WITNESS the Department of Public Works of Washington, this 22nd day of June, 1922.

DEPARTMENT OF PUBLIC WORKS OF WASHINGTON.

By E. V. KUYKENDALL,
Director.

HANCE C. CLELAND,
Supervisor of Public Utilities.

FRANK R. SPINNING,
Supervisor of Transportation.

ATTEST: J. H. BROWN,
Secretary.